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EXPORT ADMINISTRATION ACT

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INTERNATIONAL ECONOMIC POLICY

OF THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

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EXPORT ADMINISTRATION ACT

MONDAY, JUNE 27, 1983

United States Senate,
Subcommittee on International Policy of the
Committee on Foreign Relations,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:06 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Charles McC. Mathias (chairman of the subcommittee) presiding.

Present: Senators Mathias and Percy.

Senator **Mathias.** The committee will come to order. The Export Administration Act of 1979 authorizes controls on the export of U.S. goods and services for three purposes: to protect national security; to achieve certain foreign policy goals; and to prevent depletion of goods that are in short supply.

The statutory authority for these controls will expire on September 30, 1983. Committees of both the Senate and the House of Representatives recently have completed work on bills to renew these export-control authorities for an additional 6 years.

I think it has to be stated at the beginning that the Committee on Foreign Relations does not claim to have jurisdiction over these three sets of proposals in a narrow sense, but in a broader sense we have a legitimate interest in the extension. This act and the proposed extension of it create policies and give rise to procedures which, on the one hand, may strengthen the formulation and execution of the foreign policy of the United States, but, on the other hand, might undermine the conduct of the U.S. foreign relations.

This is a kind of double-edged quality that was demonstrated very dramatically during the past year by the episode involving the Soviet gas pipeline. Measures taken to force modification or reversal of Soviet behavior became a serious irritant to our closest friends abroad and affected our relations with them.

The reasons this committee must consider carefully the implications of extending or enlarging the provisions of the act are twofold. First the committee has been increasingly concerned by policies which undermine U.S. economic strength and has focused on policies which will expand exports and jobs both to support our international objectives and to promote recovery at home in places such as the Port of Baltimore, the city of Chicago, the city of Detroit, and other impacted areas.

Second, the committee is concerned with oversight of foreign policy management, and I think this is illustrated by communications recently received from the European community, from Canada, from the United Kingdom and from others expressing serious concern about certain provisions in the present act and concern about proposed revisions to the present act.

A recent European community aide memoire ends with this statement:

> The community and its member states wish to reiterate their deep concern with the features of the administration's proposal discussed above and in particular with its extraterritorial and retroactive reach. They, therefore, urge the administration to reconsider these aspects which are contrary to international law and comity and are unacceptable in the context of relations with friendly countries.

The committee will want to give particular attention to the issues affecting its responsibilities such as controls and penalties having extraterritorial reach to entities located abroad and under the jurisdiction of foreign governments, and foreign policy control measures which could undermine rather than reinforce unity with friendly governments.

We are especially grateful to our witnesses this morning for taking time to appear and to prepare written accounts of their views on the complex issues before us. We will hear first from a panel of one government and three private sector witnesses including Mr. James Giffen, the senior vice president of Armco Steel Corp.; Mr. Allen Mendelowitz, Director of the General Accounting Office; Mr. Stanley Marcuss, partner of Milbank, Tweed, Hadley & McCloy; and Prof. Kenneth Abbott of the Northwestern University School of Law.

Following this panel we will hear from Deputy Secretary of State Kenneth Dam. We are particularly grateful for the appearance of Secretary Dam who has been intensely occupied as Acting Secretary of State in the absence of Secretary of State George Shultz who is tending to our relations in Southeast Asia.

Before we begin the panel let me turn to the chairman of the committee, Senator Percy, to see if he has any opening statement.

The CHAIRMAN. Mr. Chairman, I stopped by to welcome our witnesses and thank them for preparing to be before the committee this morning on relatively short notice on a very important subject, and also to express my appreciation to you for chairing these hearings. I have just returned from 4 days in Illinois so I will have to be in and out a little bit. I will try to get back to question a few of the witnesses, but if I do not I will leave my questions with you, Mr. Chairman.

This is an issue about which I have some very strong feelings, some of which coincide with administration policy on export controls and some of which run contrary to it. I was on the Banking Committee when I first came to the Senate and immediately began work on what was then called the Export Control Act.

In business, I had been on the receiving end of that act and had seen some of its utter stupidities. If ever we caused self-inflicted wounds, "shooting ourselves in the foot," we did it with that act.

I sat as head of the Bell & Howell Co., unable to ship to the Soviet Union $250,000 of printers, splicers, and perforators for the professional motion picture industry. This equipment, which we had given them under lead-lease all through World War II, was now on the prohibited list. Yet our licensee, J. Arthur Rank, continued to ship the exact equipment year after year, collecting the full premium price and a handsome profit on all the direct labor and overhead. All we got was a little royalty as a result of it.

Were we hurting the Soviets? Not one bit. We were hurting ourselves, and we did this time after time after time.

There are some muddle-headed people who respond emotionally: "the Soviets have done something so now we have to do something in return." We also hurt ourselves for other purposes, such as when we put an embargo under the Nixon administration on export of agricultural products considered to be in short supply in order to bring down prices in this country. Did that help this country? Did it help the consumers? Did it help the Government? What happened as a result of that embargo?

Japan put $1 billion into Brazil and started a soybean industry there—now Brazil is one of our most effective competitors. We created a competitor that has been taking markets away from us ever since then.

The embargo on the grain shipments, of course, because of Afghanistan is noteworthy. Originally I was among those who were enraged at what the Soviet Union had done and emotionally I supported that embargo, until I realized that it was damaging us, not the Soviet Union.

I cannot find any record of where we have influenced a country's foreign policy as a result of such an embargo. We have just exercised our emotions.

I supported and applauded President Reagan as he denounced that embargo and said he would take it right off, and he did. But then the administration put an embargo on the pipeline, and that hurt us.

We exported thousands of jobs to Japan. We gave away the pipelayer market. There is no unique technology involved. I have examined two pipelayers right in front of me, Komatsu and the one made by Caterpillar in Peoria, one with Japanese labor and one with American labor. You could not tell the difference between those pipelayers.

Japan did not say they were going to embargo. In fact, when we imposed that pipeline embargo we drove our allies into bed with the Soviet Union. If the KGB had invented that policy it could not have been more damaging to us.

We do not impress our adversaries one bit by kicking ourselves and our allies in the shin. Rightfully then administration officials reversed this policy, recognizing that they had an Edsel on their hands and that they had better get rid of it.

So we found a way out of it, and I give great credit to the administration. When they make a mistake like Ford made on the Edsel design, they dropped it, and did not just tenaciously stick with it. We sat down on the Banking Committee and determined that if goods were available from other places it would do no good to embargo.

So there are a number of export control issues that some of us feel quite strongly about. We must avoid stupid economic policies which do things that only hurt us and do not hurt our adversaries.

The testimony you will be giving to us will be extraordinarily helpful in modifying and improving the Export Administration Act. But let us remember that the greatest strength of this country is our economy. If we do not have a strong economy we cannot afford our defense budget, and if we do not have a good, strong defense we will not have a good credible foreign policy.

Though that thinking may run against the grain of some of the testimony that we are going to hear today, that is how I feel about it and that is how I will vote.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you, Mr. Chairman.

Now, because we expect Secretary Dam to join us at about 11:30 and because we want to have sufficient time for questions to this panel and to thoroughly explore this subject, I think it would be desirable if each panel member can keep his initial statement to a limit of 5 minutes.

The CHAIRMAN. That is, shorter than mine, I hope. [Laughter.]

Senator MATHIAS. If you keep your statements to 5 minutes, we will, of course, have your full prepared statements appear in the record.

We will begin if we may with Mr. Giffen for his 5 minutes.

STATEMENT OF JAMES H. GIFFEN, SENIOR VICE PRESIDENT, ARMCO STEEL, NEW YORK, N.Y.

Mr. GIFFEN. Thank you, Mr. Chairman.

After listening to Senator Percy, I think I am ready to have a vote right now.

Senator MATHIAS. If we could handle it with just Senator Percy and me voting, we would have a very satisfactory output.

Mr. GIFFEN. I would vote for that, too. I will submit my formal statement for the record and limit my remarks to three rather simple but basic points with respect to the act, which I believe have not been properly understood by this Government nor adequately covered by the legislation recently recommended by the House Foreign Affairs Committee or the Senate Banking Committee.

First, foreign policy controls are redundant and ineffective. Second, national security controls are absolutely necessary, but they must be applied in a fair, consistent and rational manner. Third, and probably most important, this Government must recognize both in principle and in law that the word of the United States and its businessmen is sacred and that contracts once entered into with U.S. Government approval will not be subsequently terminated for any purpose short of a national emergency.

First, let's consider the foreign policy controls of the act. There is no necessity for foreign policy controls within the act because they are redundant and ineffective. They are redundant because the President has adequate authority to apply emergency export controls under the International Emergency Economic Powers Act or alternatively he can always ask Congress for leigslative authority to impose special controls.

They are also ineffective. Why? Effectiveness must be measured in terms of what you are attempting to accomplish. There are only three possible reasons for the use of foreign policy controls.

Foreign policy controls can be used for punitive purposes, remedial purposes of declarative purposes. Regardless of which purpose is chosen, the question must be raised as to whether the desired result can be achieved.

To successfully utilize trade sanctions against the Soviet Union in an attempt to inflict punishment or induce remedial Soviet action, the United States must have leverage. No trade sanction, no embargo, no active economic warfare has ever worked when the country applying the sanction or embargo did not have leverage.

A country can only have leverage with respect to a second country when that second country has either an absolute need or the perception of an absolute need for a particular technology or product and no other source to obtain it from except the country applying the embargo. Quite frankly, Mr. Chairman, it is difficult to think of any technology or product that the Soviets need and which is not available to them either internally or from our trading partners that do not join us in such sanctions which is fundamental to the survival of their country.

If that is the case, many of us find it difficult to believe that trade sanctions can ever logically be utilized to punish the Soviets or coerce them into taking a particular action. Quite to the contrary it may well stiffen the resolve of the Soviets to do just the opposite.

Even if foreign policy controls are not used to punish the Soviets or coerce them into making political concessions, some would argue that the use of sanctions or embargoes is an effective method of making a political statement. Mr. Chairman, I believe that is true. I believe that the withdrawal of trade is a very serious matter and one which every country in the world would understand as being a sign of displeasure.

However, as we all know there are both benefits and economic and political costs involved in applying trade sanctions, and the consequences should be carefully considered before taking such action. As soon as sanctions are applied the American business community and the U.S. economy experience rather immediate direct costs in the form of lost contracts, lost profits, lost balance-of-payments dollars, and lost sources of raw materials supplies and energy supply.

For example, Armco alone had concluded one contract for a rather low-technology steel facility worth over $350 million and an aide memoire for an oil-and-gas project worth approximately $9 billion when the Afghanistan sanctions were applied. Furthermore, the Soviets have recently identified at least six other industrial projects that could have gone to American companies if it were not for the sanctions worth approximately $2.1 billion and four projects that may soon be given to our trading partners worth over $4.4 billion.

In addition to these obvious potential loss benefits, the U.S. business community suffers future potential losses because not only the Soviet Union but also the rest of the world have come to look upon it as an unreliable supplier. The lost jobs and profits resulting from the sanctions may not seem very significant, Mr. Chairman, but if they are not someone should tell that to the 15,000 Armco employees that have been laid off in the last 12 months and to our shareholders.

Finally, if unilateral controls or sanctions are applied and attempts are made to apply them unilaterally and extraterritorially, our political benefit is not lost as well. Unilateral extraterritorial sanctions that divide the alliance can only be useful to the Soviets. No good can come of it to the United States.

Second, let's consider the act's national security controls. The act makes it clear that export controls should be used to restrict the exports of goods and technology which would make a significant contribution to the military potential of any other country which would prove detrimental to the national security of the United States.

The only thing that is not clear is what that phrase means and how it should be implemented. What is clear is that the act intends to restrict the export of any technology or product which is basically military in nature such as weapons technology, et cetera.

It is also clear to even those who hold philosophies which are just to the right of Attila the Hun that the act is not intended to restrict august nonmilitary items such as consumer goods. The key issue is, however, where do we draw the line between those two categories of exports.

The problem is further exacerbated when a particular technology or product is capable of being used for dual purposes. That is, technology or products can be used for either military purposes or nonmilitary purposes.

What is missing, Mr. Chairman, from the current legislation are standards or guidelines that the executive branch of the Government can utilize in making the determination as to what is militarily significant, and I have set out some guidelines. There are some items that we think should be in those guidelines in our formal testimony.

Mr. Chairman, if this Congress does not see fit to include standards or guidelines which the executive branch of the Government can utilize in determining which exports are militarily significant, those who are against any trade with the United States and the Soviet Union today will not need the foreign policy controls of the act to limit or prevent an expansion of trade. All they need merely do is claim that a given political or military situation in the world caused by an adversary nation has changed the status quo in such a way that the exports which previously had not been considered militarily significant are now considered to be significant.

Mr. Chairman, last week an important Soviet trade delegation arrived in the United States for discussions with the U.S. Government and business leaders. The delegations included representatives from the Soviet Ministry of Foreign Trade and other crucial and critical Soviet foreign trade organizations.

The leaders of that delegation made it absolutely clear that the Soviet Union recognized the sovereign right of the United States to determine which export it wishes to allow to the Soviet Union and which exports it will not allow. The Soviets do not necessarily agree with our national security control definitions and while they totally disagree with the foreign policy provisions of the act, they do not question the right of the United States to have such controls.

They do make it absolutely clear, however, that if the United States wishes to continue a trading relationship with the Soviet Union, executed contracts operating under approved licenses must not be breached. In short, the United States should keep its word.

Furthermore, Mr. Chairman, American businessmen will not be interested in exploring the expansion of trade between the two countries unless there is a meaningful sanctity of contract provision within the act. This should not be objectionable to the administration since President Reagan himself has stated that there must be no question about our respect for contracts.

Unfortunately, there is no sanctity of contract provision in the act, and the only provision that I am familiar with in the legislation that has been recommended by the House Foreign Affairs Committee or the Senate Banking Committee is a proposed amendment to section 6(1)(a) of the act dealing with foreign policy controls.

Mr. Chairman, are foreign policy controls and sanctions the most cost-effective method of making progress on the issues that divide the United States and the Soviet Union, or are we merely utilizing them out of a sense of frustration because we do not have the imagination or resourcefulness to fund other alternative means of dealing with the Soviets.

Senator MATHIAS. Mr. Giffen, the sanctity of one contract we are going to have to recognize now is our 5-minute rule. If not, we will run out of time. Your full statement will appear in the record, of course, and I would remind you that the light system is the ordinary traffic light system. Green for going ahead as fast as you can; yellow means you are running out of time; and red means you will stop.

Thank you, Mr. Giffen.

[Mr. Giffen's prepared statement follows:]

PREPARED STATEMENT OF JAMES H. GIFFEN

Mr. Chairman, members of the subcommittee, my name is James H. Giffen. I am Corporate Vice President-Corporate Strategy and Development of Armco, Inc. and President of Armco's foreign trading subsidiary, Armco International Inc. which coordinates Armco's marketing programs in the planned economy countries. I am also Chairman of the New York District Export Council.

Mr. Chairman, in 1969, at about the same time the United States Congress was considering revisions of the Export Control Act of 1949 Armco received an inquiry from the Soviet Union concerning Armco's interest in selling its electrical steel technology.

In June of 1973, after we had made a preliminary determination that an export license might be granted for the export of the technology, we submitted a general proposal to Minister of Foreign Trade Patolichev during his visit to Washington with General Secretary Brezhnev.

In 1974, we concluded an aide memoire with the Ministry of Foreign Trade which noted the Soviets' desire to purchase and Armco's desire to sell the electrical steel technology previously requested.

On April 16, 1976, after the Soviets had defined the type of project they were interested in, Armco received a specific inquiry and request to submit a quotation for the technology, engineering and equipment for an electrical steel facility to be constructed in the city of Novolipetsk in the Soviet Union. Because of a lack of United States Export-Import Bank financing for exports to the Soviet Union, Armco joined forces with Nippon Steel Corporation of Japan to make use of Japanese Export-Import Bank financing and we submitted a proposal for the Novolipetsk facility.

Between 1976 and 1979, a 40-man Armco-Nippon Steel technical and commercial team made hundreds of visits to the Soviet Union to negotiate the transaction. For example, in 1979, I personally made 14 trips to Moscow to complete the negotiations.

On December 17, 1979, after three years, eight months and one day of negotiations from the date we had received the original specific inquiry and some 10 years from the initial Soviet contact, the Chairman of Nippon Steel, the Chairman of Armco and I signed an 8,000 page, 23 volume contract for $353 million.

Seven days later, the Soviets marched into Afghanistan and on January 11, 1980, Armco was informed that the export licenses that had been previously granted under the authority of the Export Administration Act had been suspended and that no action would be taken on other outstanding license applications. While we formally terminated our contractual relationship with the Soviet Ministry of Foreign Trade on the project in April of 1980, we did not receive notice that our license was withdrawn until May of 1981.

You should understand that during the several years of negotiations, we had been in close competition with other European and Japanese companies. Our closest competitor was Creusot Loire of France. As soon as we terminated our discussions with the Soviets, representatives of Creusot Loire immediately began negotiations on the project even though the French Government repeatedly informed the United States Government that, in general, it would not allow French companies to take over executed contracts of American companies which had been terminated because of the Afghanistan sanctions and, in particular, would not allow Creusot Loire of France to take over the Armco-Nippon Steel contract.

On August 1, 1980, however, the French Government informed the United States Government that it would allow Creusot Loire to do so and within 30 days a contract was signed between Creusot Loire and the Soviets on a "Novolipetsk project" which was purportedly different from the Armco project. That contract is now being executed and the Novolipetsk electrical steel facility is being constructed.

With the imposition of the export controls on the Novolipetsk project, the United States and Japan lost over $300 million in positive balance of payments from the loss of the exports as well as the jobs that would have been created from such exports. Armco and Nippon Steel lost over $40 million in capital formation and, of course, some $5–6 million in negotiation expenses. Furthermore, Armco's opportunities to sell further metallurgical technology or oilfield technology and equipment to the Soviets in the future was considerably weakened, if not totally lost. In another situation, Armco and a major American oil company entered into a joint venture to explore the possibilities of acquiring Soviet oil and gas in return for the sale of oilfield technology and equipment. The concept that was proposed was that incremental oil and gas could be produced in the Soviet Union and could be used to pay not only for the technology and equipment needed for the incremental tonnage but also for other Soviet projects.

A proposal was prepared in the summer of 1978 and delivered to the Soviet Ministries of Foreign Trade, Petroleum, Gas, Petroleum Refining and Petrochemical Industry and Geology as well as to the Gosplan and other Soviet organizations. After extensive analysis and discussions, Armco and its American partner entered into an aide memoire with the Soviets on the project in October 1979. The project covered three main areas—enhanced oil recovery, offshore exploration and production and onshore exploration and production. Nine major projects were agreed upon.

In January 1980, Armco and its partner withdrew from the project because of the Afghanistan sanctions. Since that date, one contract has already been concluded with our competitors from France and West Germany for an estimated value of $500 million. Other contracts are now under discussion for the remaining projects. The value of those contracts is estimated approximately $8.3 billion.

In addition to the Armco contracts that were lost, the Soviets recently identified at least six other projects that could have gone to American companies if it were not for the sanctions. Those projects had an estimated value of approximately $2.1 billion. Furthermore, the Soviets have identified four other major projects that will soon be given to our trading partners which could have gone to American companies worth over $4.3 billion.

The lost jobs and profits resulting from the restrictions may not seem very significant, Mr. Chairman, but if they are not, someone should tell that to the 15,000 Armco employees who have been laid off in the last 12 months and to our shareholders.

Mr. Chairman, the cost of export restrictions and trade sanctions are explicit and felt immediately by the American business community. Many of us who are experiencing those costs appreciate this opportunity to review the language and implementation of the Export Administration Act of 1979. The key issue that must be addressed is whether the desired effect, result or purpose of the restrictions and sanctions has been, or will be, achieved and whether that result or purpose can be achieved on a cost effective basis.

Today, Mr. Chairman, I would like to limit my remarks to the question of how effective the restrictions or sanctions have been which have been established under the authority of either the national security or foreign policy provisions of the Act, the issue of sanctions of contracts and what revisions might be recommended to make the Act more effective. I will also make my remarks in the context of the Act's application to the Soviet Union.

FOREIGN POLICY CONTROLS

First, let's consider the foreign policy controls of the Act.

There is no necessity for foreign policy controls within the Act because they are redundant and ineffective. They are redundant because the President has adequate authority to apply emergency export controls under the International Emergency Economic Powers Act, or alternatively, he can always ask Congress for legislative authority to impose special controls.

They are also ineffective. Why? Effectiveness must be measured in terms of what you are attempting to accomplish.

There are only three possible reasons why export controls should be utilized for foreign policy purposes.

First, foreign policy controls can be utilized for punitive purposes. For example, controls can be applied against exports to the Soviet Union based upon the proposition that the Soviet Union is the chief adversary of the United States and that we should, therefore, utilize sanctions to damage the Soviet Union both economically and militarily. Let's call a spade a spade. Utilizing sanctions for punitive purposes is economic warfare.

Second, foreign policy export controls can be utilized for remedial purposes, that is to say, controls can be used in an attempt to remedy a specific situation. We can apply sanctions against the Soviet Union in an attempt to pressure or even coerce the Soviets into taking some particular action or refraining from some activity.

Third, foreign policy export controls can be utilized for declarative purposes. We can apply controls against the Soviet Union in an effort to make a political statement which registers our indignation and displeasure over certain Soviet activities. The controls can be aimed at the Soviet Union and/or the international or domestic politic.

Regardless of which purpose is chosen to justify the use of such controls, the question must be raised as to whether the desired purpose can be achieved. Let's examine that question.

To successfully utilize trade sanctions against the Soviet Union in an attempt to inflict punishment or induce remedial Soviet action, the United States must have leverage.

No trade sanction, no embargo, no act of economic warfare has ever worked when the country applying the sanction or embargo did not have leverage. A country can only have leverage with respect to a second country when that second country has either an absolute need or the perception of an absolute need for a particular technology or product and no other source to obtain it from except the country applying the embargo.

Quite frankly, Mr. Chairman, it is difficult to think of any technology or product which the Soviets need and which is not available to the Soviets either internally or from our trading partners that do not join us in such sanctions which is fundamental to the survival of their country. If that is the case, many of us find it difficult to believe that trade sanctions can ever logically be utilized to coerce the Soviets into taking a particular action. Quite the contrary, it may well stiffen the resolve of the Soviets to do just the opposite.

It might be argued, however, that there are several technologies and products which the Soviets do need and which might be significant to the development of their economy and, if the United States were successful in inducing our trading partners to join in a multilateral sanction involving those particular technologies or products, it would be harmful to the Soviets.

The question is, will our trading partners join us in such sanctions, and if they won't what will be accomplished? If they do join us in applying sanctions, we will be engaged in economic warfare which will not only increase international tensions but will also raise doubts, to the rest of the world as to the reliability of the United States and the West as a supplier. If they do not join us, very little will be accomplished except that United States business will lose another market to our trading partners.

Even if foreign policy controls are not used to punish the Soviets or coerce them into making political concessions, some would argue that the use of sanctions or embargos is an effective method of making a political statement.

Mr. Chairman, I believe that is true. I believe that the withdrawal of trade is a very serious matter and one which every country in the world would understand as being a sign of displeasure. However, as we all know, there are both benefits and economic and political costs involved in applying trade sanctions and the consequences should be carefully considered before taking such action.

For example, as soon as sanctions are applied, the American business community and the United States economy experience rather immediate direct costs. Some argue that these costs are not very significant. Let's examine that issue.

While it is true that United States-Soviet trade has never been more than 0.5 percent to 1.2 percent of total United States foreign trade, United States-Soviet trade is not necessarily insignificant.

Consider the record.

Since 1970, the United States has realized a negative balance of payments in its overall trade turnover in all but three years. During that same period, however, the United States realized a positive balance of trade with the Soviet Union in every year. In fact, the positive balance of trade with the Soviet Union reduced the overall deficit by approximately 5–10 percent throughout the period, thereby strengthening the dollar and contributing to the United States economy.

Furthermore, while the United States had realized a net positive balance of approximately $450 billion (as measured in 1982 dollars) from its overall trade since 1914—approximately $40 billion of that amount was realized from United States' trade relations with the Soviet Union.

There are other benefits that can be lost:

Trade with the Soviet Union leads to capital formation and creation of jobs,

Trade with the Soviet Union gives the United States access to Soviet raw material sources and sources of energy supply, thereby creating less dependency on Middle East sources,

Trade with the Soviet Union helps create standardization and therefore dependency upon American technology and products for the future through sales of such products to the Soviet Union today, and

Trade with the Soviet Union provides the United States with access to new technology not available in the United States.

In addition to these obvious potential lost benefits, the United States business community also suffers future potential losses because not only the Soviet Union but also the rest of the world have come to look upon it as an unreliable supplier.

Finally, if unilateral controls or sanctions are applied and attempts are made to apply them unilaterally *and* extraterritorially, are political benefits not lost as well? One of the features that differentiates the West from the Soviet Union and gives it the strength and resolve to cope with the Soviets both politically and militarily is the Western Alliance. Unilateral, extraterritorial sanctions that divide the Alliance can only be useful to the Soviets. No good can come of it to the United States.

If, therefore, sanctions are to be utilized for foreign policy purposes upon the basis that it is an effective method of making a political statement, the benefits that are to be derived from making that statement must be carefully analyzed. Many of us in the business community believe that there are more cost effective methods of accomplishing our goals. For example, after the placement of the various controls and sanctions on trade with the Soviet Union since 1978 and with the loss of several billion dollars of contracts, what has really been achieved? Have Shcharansky or Ginzburg been released? Has Soviet immigration gone up or down since 1978? Have the Soviets pulled out of Afghanistan? Have the Soviets decreased their influence in Poland? Has the Urengoi pipeline been stopped?

Are foreign policy controls and sanctions the most cost effective method of making progress on the issues that divide the two countries or is the United States merely utilizing them out of a sense of frustration because it does not have the immigration or resourcefulness to find other alternative means of dealing with the Soviets? When, Mr. Chairman, are we going to realize that no sovereign power will allow itself to be blackmailed or bullied?

If progress is to be made on the outstanding issues that divide the United States and the Soviet Union, the solution lies at the negotiation table, not in empty threats or ineffective action.

NATIONAL SECURITY CONTROLS

Second, let's consider the Act's national security controls.

The Act makes it clear that export controls should be used to restrict the export of goods and technology which would make a "significant contribution" to the military potential of any country which would prove detrimental to the national security of the United States. The only thing that is not clear is what that phrase means and how it should be implemented.

What is clear is that the Act intends to restrict the export of any technology or product which is basically military in nature such as weapons, technology or products that can be utilized in weapons or technology or products that can be utilized in the manufacture and production of weapons.

It is also clear to even those who hold philosophies which are just to the right of "Atilla the Hun" that the Act is not intended to restrict obvious non-military items such as consumer goods. The key issue is, however, where do we draw the line between those two categories of exports? The problem is further exacerbated when a particular technology or product is capable of being used for "dual" purposes--that is, technology or products can be used for either military purposes or for non-military purposes.

What is missing from the current legislation are standards or guidelines that the executive branch of the government can utilize in making the determination as to what is "militarily significant."

The guidelines or standards should probably include consideration of whether:

(1) there is a reasonable likelihood that the technology or product to be exported would actually be used more for military purposes than for civilian purposes;

(2) the particular technology or product would make a substantial contribution to the military potential of the Soviet Union; and

(3) the Soviet Union could obtain the same technology or products from another source or produce it themselves in some significant time frame and at some comparable cost.

Furthermore, Mr. Chairman, without Congressional direction, some might argue that export controls should be utilized to prevent not only exports which contribute directly to the military potential of the Soviet Union, but also exports which contribute indirectly to the military potential through the strengthening of the Soviet economy. This argument is, of course, based upon the proposition that the military potential of the Soviet Union rests upon the technological base of the economy and that, therefore, no export should be allowed which contributes to the Soviet economy. Any export theoretically helps an importing country's economy. Such a standard, if adopted, would simply be no standard and the executive branch would be free to utilize their absolute discretion in determining what export should be controlled and when. That is not, nor should it be the intention of the national security controls of the Act.

Mr. Chairman, if this Congress does not see fit to include standards or guidelines which the executive branch of the government can utilize in determining which exports are "militarily significant," those who are against any trade between the United States and the Soviet Union today will not need the foreign policy controls of the Act to limit or prevent an expansion of trade. All they need merely do is claim that a given political or military situation in the world caused by an adversary nation has changed the status quo in such a way that exports which previously had not been considered militarily significantly are now considered to be significant.

For example, when we were notified in January of 1980 that our licenses for the Novolipetsk Dynamo Steel Facility were to be suspended, we were left with a clear impression that they were being suspended for foreign policy purposes. However, when we were notified by the Department of Commerce that our licenses were revoked, we were told that they were being revoked on the grounds that "in light of the national security situation following the Soviet invasion of Afghanistan," the export of electrical steel technology for the Novolipetsk Dynamo Facility would be "detrimental to the national security interest of the United States."

In short, the executive branch needs direction from this Congress as to what the term "militarily significant" means. Neither the current legislation nor the proposed legislation recommended by the House Foreign Affairs Committee or the Senate Banking Committee adequately set out such standards.

SANCTITY OF CONTRACTS

Mr. Chairman, last week an important Soviet trade delegation arrived in the United States for discussions with United States Government and business leaders. The delegation included representatives from the Soviet Ministry of Foreign Trade, the U.S.S.R. Chamber of Commerce, the Ministry of Agriculture and other prominent Soviet organizations. The leaders of that delegation made it absolutely clear that the Soviet Union recognized the sovereign right of the United States to determine which exports it wishes to allow to the Soviet Union and which exports it will not allow. The Soviets do not necessarily agree with our national security control definitions, and while they totally disagree with the foreign policy provisions of the Act, they do not question the right of the United States to have such controls.

They do make it absolutely clear, however, that if the United States wishes to continue a trading relationship with the Soviet Union, executed contracts operating under approved licenses must not be breached. In short, the United States should keep its word. Furthermore, Mr. Chairman, American businessmen will not be interested in exploring an expansion of trade between the two countries unless there is a meaningful "sanctity of contract" provision in the Act. This should not be objectionable to the administration, since President Reagan himself has stated that "there must be no question about our respect for contracts. We must restore confidence in the United States' reliability as a supplier."

Unfortunately, there is no sanctity of contract provision in the Act and the only provision that I am familiar with in the legislation that has been recommended by the House Foreign Affairs Committee and the Senate Banking Committee is a proposed amendment to section 6(1)(a) of the Act dealing with foreign policy controls. The proposed amendment states:

"The President may not, under this section, prohibit or curtail the export . . . of goods, technology or other information in performance of a contract or agreement entered into before the date on which the President notifies Congress of his intention to impose controls. . . ."

Note that the proposed amendment clearly states that the sanctity of contract protection applies "under this section" which means that it only applies to foreign policy controls. However, as I have already pointed out, since there are no adequate standards or guidelines for when the national security controls should be applied, the executive branch can effectively circumvent the sanctity of contract provisions merely by suspending licenses on the basis of national security controls.

Mr. Chairman, this committee should understand very clearly that without an adequate and meaningful sanctity of contract provision, neither the Soviet Union nor the American business community will be willing to enter into attempts to expand the trading relationship. No other provision of the Act is more important.

RECOMMENDATIONS

Mr. Chairman, after having been involved in United States-Soviet trade for over 20 years and watching United States export policy zigzag depending upon the perception of one administration to the next and after watching our balance of payments situation steadily decline, I would argue that the time has come for the United States to adopt a comprehensive, coordinated and effective export policy and set it out clearly in the Export Administration Act. Accordingly, I would like to make the following recommendations with respect to the revision and extension of the Act.

First, foreign policy controls should be eliminated. However, if the Congress, in its wisdom, determines it necessary for the President to have the authority to apply foreign policy controls under the Act, the President should, at minimum, be required to consult with the Congress and provide a public forum for comment before the application of such controls.

Second, standards should be set for applying national security controls. The Act should clearly define standards that should be utilized by the executive branch in administering the Act and in determining which exports would "significantly" contribute to the military potential of any country and which would prove detrimental to the national security of the United States. The Act should not be applied to exports simply because they might contribute to a country's economy. There must be some military application and it must be significant.

Third, export controls should not be utilized on an ex post facto basis nor should they be utilized extraterritorially.

Once contracts have been concluded under the authority of general licenses or, once valid licenses have been granted, controls or sanctions should not be allowed on a retroactive basis.

Furthermore, foreign policy or national security controls should not be applied in an extraterritorial manner. The recent experience with the Urengoi Pipeline proved the futility of such an approach. The Alliance suffered more than the target country.

Fourth, the executive branch should be directed to continue its efforts to enter into multilateral agreements and perhaps even treaties with their trading partners to gain common agreement as to what should and what should not be controlled for national security purposes.

Fifth, the Department of Commerce should be directed and required to work closely with representatives of the private sector in reaching a determination as to which exports should be controlled for national security purposes. Further, if foreign policy controls are to be utilized, a careful cost benefit analysis must be provided for in any new revised legislation in consultation with the American business community since it is the American business community that will most directly feel the effects of the use of such controls.

Sixth, and finally, some provision must be made to insure that the decisions that are made within the policies set forth in the Act have been implemented fairly. Some provision must be made that actions taken by the Department of Commerce or other administrative agencies are capable of review by either the Congress, an independent government agency or the judicial branch of the government.

CONCLUSION

Mr. Chairman, in recent years, relations between the United States and the Soviet Union have been deteriorating and the prospects for the future are not positive. The Soviets have proven themselves to be both pragmatic and opportunistic and they take advantage of any situation whenever it has been in their best interest to do so. When they have been successful, it has been at least in part, because the United States has not been able to put competing priorities in perspective.

Mr. Chairman, the first priority of the United States is national security but, the national security is dependent upon maintaining a strong, military capability and a healthy and vigorous economy. We must strike a balance between concerns that we might well be exporting technology or products that contribute to the Soviet military potential and concerns that our regulations will be overly restrictive and impact the entire trade process—thereby reducing whatever advantages the United States might obtain from such trade.

Senator MATHIAS. Who would like to succeed Mr. Giffen? Mr. Mendelowitz.

STATEMENT OF ALLAN I. MENDELOWITZ, ASSOCIATE DIRECTOR, NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIVISION, U.S. GENERAL ACCOUNTING OFFICE

Mr. MENDELOWITZ. Thank you, Mr. Chairman.

At the request of Senator Percy, we reviewed the administration's implementation of certain provisions of the Export Administration Act of 1979 which require consideration of the domestic economic impact of foreign policy controls. Specifically, we looked at the consultation required, as appropriate, with business, and the administration's consideration of the economic impact of the controls before applying them or extending them.

To do this, we reviewed the administration's actions in four recent cases in which export controls were imposed for foreign policy reasons. These include the oil and gas controls imposed on the Soviet Union and the controls imposed on Libya. We also looked at the extension of controls in 1981 and 1982 with respect to South Africa.

The administration carried out what might be called formal business consultations in only one of our case studies, the comprehensive export controls for Libya imposed on March 12, 1982. In this case, Commerce and the State held a meeting with known and available U.S. exporters to Libya on March 4, 1982. Commerce extended the invitation to these businessmen only 1 day before the meeting was held, and did not inform them of the purpose of the meeting. It did solicit comments on the proposed controls from the participants, but required that any comments be received the next day.

Business representatives were highly critical of this, and did not consider it meaningful consultation.

The administration's reason for lack of more formal consultations was that officials didn't want information to leak out that would dilute the foreign policy implications or consequences of their actions. Despite these minimal consultations, the administration was aware of business' key criticisms of foreign policy controls well in advance of the Soviet control actions. It was public knowledge in mid-1981 that the administration was reviewing trade with the Soviet Union, and that one issue still to be decided was the degree to which the U.S. suppliers of oil and gas equipment would be permitted to participate in Soviet energy development.

Information came from the Advisory Committee on East-West Trade which made the full range of its concerns known to the administration, and additional information was provided from the President's Export Council and its Subcommittee on Export Administration.

Business has other opportunities to make its views known, and those include the public comment period following the announcement of controls; very little information was provided during public comment periods because the businessmen generally viewed this period as a pro forma exercise.

With respect to the specific issue of what economic cost information was developed by Commerce and reported to the President or other decisionmakers, we found the administration did have basic knowledge of direct export costs and the effects of controls on some individual companies, based on data in the Government's general files and on communications from major exporters who were affected. In general, it did not have data on the controls' secondary effects, such as the consequences for future trade, impact on subcontractors, jobs, et cetera.

A more thorough analysis and calculation of the economic effects, including the secondary effects of the export controls, is likely to be difficult and time consuming. Commerce does not presently have some of the quantitative information needed for assessing economic costs. Data are available for items currently subject to controls. However, detailed data are not available on exports of noncontrolled items, the extent and location of subcontractors, expected future sales, foreign availability of items equivalent to those controlled, and the impact of controls on the reputation of U.S. companies as reliable suppliers and the resulting adverse structural changes in trade patterns.

For Commerce to have all pertinent information on hand for use in preparing thorough economic analyses on export controls, the Government would have to require extensive data submissions from business. We do not believe that such data collection is desirable or realistic. As you know, the Export Administration Act of 1979 guides but does not precisely limit Presidential use of foreign policy export controls. It permits the President to exercise his judgment on a case-by-case basis.

Changing the act to try to improve decisionmaking is possible, but implementation of these changes is likely to be extremely difficult and have limited benefits. For example, requiring additional data collection and economic analysis, and setting guideposts concerning the tolerable level of economic costs that might be incurred for potential foreign policy benefits is unlikely to improve decisionmaking because of constraints on data collection and analysis and the predominance of foreign policy considerations.

There is potential for revising the law to reduce the burden on the private sector through provisions safeguarding contract sanctity or limiting extraterritorial reach. However, such changes address only part of the basic problem of damage to U.S. companies' reputations as reliable suppliers.

Other possible changes would not necessarily contribute to better decisionmaking as a general proposition. However, these changes could reduce the use of foreign policy export controls by restricting them or making them more cumbersome to use. Improving Commerce's foreign availability assessment capability and allowing foreign policy controls only when there was no foreign availability would substantially reduce their use.

In our view, the key problem of foreign policy export controls is that their economic costs have been more visible than their political benefits, yet their foreign policy rationale has overridden such cost considerations. By demonstrating that the administration did know the essential economic arguments against the use of export controls, our review helps to clarify the debate on foreign policy controls in the sense that it refutes the premise that the administration might have acted differently had it been aware of the probable economic costs, and it shifts the debate back to the usefulness of such foreign policy controls.

If the Congress believes it is desirable for the President to have this kind of foreign policy tool, then it may have to rely on the judgment of the President to impose controls only where a consensus exists that the foreign policy purposes can be achieved at a reasonable cost. We do not believe that fine-tuning the act to require more economic analysis will alter the decision made.

On the other hand, if the Congress believes that unilateral foreign policy controls are not an appropriate tool to achieve foreign policy goals, then it should eliminate this broad authority from the act.

Mr. Chairman, this concludes my statement. I will be happy to answer any questions that you may have later in this session.

[Mr. Mendelowitz' prepared statement follows:]

PREPARED STATEMENT OF ALLAN I. MENDELOWITZ

Mr. Chairman and Members of the Committee: At the request of Senator Percy, Mr. Chairman, we reviewed the Administration's implementation of certain provisions of the Export Administration Act of 1979 which require consideration of the domestic economic impact of foreign policy controls. Specifically, we reviewed Administration compliance with the Act's provisions requiring (1) consultation, as appropriate, with businesses affected by the proposed controls and (2) consideration of the economic impact of such controls before imposing, expanding or extending them.

To do this, we reviewed the Administration's actions in four recent cases in which export controls were imposed for foreign policy reasons. These cases are: the controls on oil and gas-related exports to the Soviet Union of December 30, 1981 (imposed in response to martial law in Poland) and June 22, 1982 (known as the extraterritorial controls), and the controls on exports to Libya of October 28, 1981 and March 12, 1982. We also examined the process by which existing export controls for South Africa were relaxed during 1981 and 1982.

FORMAL CONSULTATION WITH BUSINESSES DID NOT GENERALLY TAKE PLACE

The Administration carried out what might be called formal business consultations in only one of our case studies—the comprehensive export controls for Libya imposed March 12, 1982. In this case, Commerce and State held a meeting with known and available U.S. exporters to Libya on March 4, 1982. Commerce extended the invitation to these businesses only one day before the meeting was held and did not inform them of the purpose of the meeting. It did solicit comments on the proposed controls from the participants but required that any comments be received by March 5. Business representatives were highly critical of this approach to business consultation because of the difficulty of producing detailed information on such short notice and because it appeared that the decision to impose export controls had in fact already been made. In the other three cases, there was either no consultation or only last minute phone calls were made to a few major U.S. exporters.

The Administration's reasons for the lack of formal business consultations before imposing export controls included (1) the need to avoid leaks which might dilute the foreign policy impact of the control decisions and (2) the desire to deter measures from being taken by the target countries and by U.S. exporters to circumvent the controls.

ADMINISTRATION KNOWLEDGE OF BUSINESS CONGRESS

Despite the minimal formal business consultations, the Administration was aware of business' key criticisms of foreign policy export controls well in advance of the Soviet control actions. It was public knowledge in mid-1981 that the Administration was reviewing trade with the Soviet Union and that one issue still to be decided was the degree to which U.S. suppliers of oil and gas equipment would be permitted to participate in Soviet energy development.

The Advisory Committee on East-West Trade has been a major forum for business-Government exchange on U.S.-Soviet trade. It consists of senior representatives of leading corporations, banks, law firms, and universities and meets quarterly to advise the Government on current trade issues. Throughout 1981, business representatives advised the Administration about their key concerns through this Committee. Such concerns included (1) the doubtful effectiveness of unilateral U.S. export controls in influencing Soviet foreign policy behavior because of the availability of alternate suppliers, (2) the need for close consultation with and strong support from West European allies, (3) adverse consequences of violating signed contracts, (4) damage to their reputations as reliable suppliers, (5) foreign suppliers replacing them in world markets by taking advantage of unilateral U.S. export controls and (6) the difficulty of removing controls if they proved ineffective, because of the foreign policy consequences of revising U.S. policy.

During the 6 months between the December 1981 controls and the June 1982 extraterritorial controls, there was some public debate both in reaction to the December controls and in anticipation of possible extension of the controls extraterritorially. Again many of the same points were made.

There was less opportunity for business-Government exchange on U.S. trade policy toward Libya, since there was no trade advisory committee similar to the one on East-West trade. Nevertheless, the deterioration in U.S. political relations with Libya during 1981 and 1982 was evident to public observers, and some businessmen started noticing longer delays in getting approval for export licenses for goods destined for Libya.

Other forums for business-Government consultation are the President's Export Council and its Subcommittee on Export Administration and the 21 Industry Sector Advisory Committees (ISACs) set up under the Trade Expansion Act of 1974. The Council did register business' general concerns about foreign policy controls during 1981 and 1982, but the ISACs, except for the aerospace ISAC, did not focus on foreign policy controls or provide cost information on the controls' effects.

The contribution that these advisory groups can make in compiling information on specific economic costs of proposed controls is limited. Proposed export controls are kept secret, and even though committee members are cleared to discuss such matters, they cannot question their industry sectors about possible economic costs.

MINIMAL VALUE OF PUBLIC COMMENT PERIOD

Businesses have two other formal opportunities to supply information and register their views on the impact of export controls: (1) the public comment period (usually 60 days) immediately after the controls are imposed and (2) the comment period during the end-of-the-year controls extension process. We found, however, that the extent and quality of the information that businesses are willing to provide during these stages is limited. This is attributable to their reluctance to have the public perceive them as siding with an unpopular target country if they oppose the controls and awareness that foreign policy considerations may deter the Administration from reversing its announced and widely publicized decision. In addition, some businesses are reluctant to make public detailed information on their expected losses or future trade strategies. It appears that most businesses view these public comment periods as pro forma exercises, with little likelihood of influencing policy decisions.

GOVERNMENT ANALYSES OF ECONOMIC COSTS

With respect to the specific issue of what economic cost information was developed by Commerce staff and forwarded to the President or other decisionmakers before controls were imposed, we found that the Administration did have basic knowledge of direct export costs and the effects of the controls on some individual companies. In general, it did not have the data to assess the controls' secondary effects, such as the consequences for future trade, impact on subcontractors, jobs, and government revenues. In this regard, we should qualify our comments by noting that top Government officials participated in the determination process and their discussions are not part of the written record.

Six days before the December 30, 1981, controls on the Soviet Union, Commerce informed the National Security Council that halting exports of oil and gas equipment would cost the U.S. economy about $210 million a year in reduced exports. This estimate was based on the value of licenses issued for oil and gas equipment during the previous year, augmented by knowledge of major upcoming sales. Commerce also noted that $80 million worth of oil and gas technology exports to the Soviet Union were denied in 1981 under prior foreign policy controls, but this amount was not included in the overall loss projection for 1982. Commerce noted that the U.S. sells equipment that the Soviets prefer but that most of it is also available from sources other than the United States.

Like the December 1981 controls, the June 1982 extension of controls extraterritorially was the result of a lengthy debate within the Administration that included Commerce-generated information on the likely domestic impact of proposed actions. As early as February 1982, Commerce had developed the economic cost information that it would continue to use until the controls were lifted 10 months later.

Concerning the very broad export controls imposed on Libya on March 12, 1982, Administration policymakers had been informed that oil and gas equipment comprised a large share of U.S. exports to Libya ($200 million to $300 million out of a total of $800 million in U.S. exports) and that one company provided a large portion of this equipment. It was also noted that Libya imported few items from the United States that were unavailable from other sources and that the reputations of U.S. companies as reliable suppliers would be hurt if controls were adopted.

For the October 28, 1981, controls on light aircraft exports to Libya, we did not see any evaluation of economic effects made prior to their imposition, even though they also had been considered by State and Commerce for several months before being imposed.

DIFFICULTIES IN REMOVING EXPORT CONTROLS

With respect to the question of how much economic analysis is made as part of the annual controls extension process, we found that usually only perfunctory analysis is made and that it does not represent a continuing effort to monitor adverse economic effects.

A basic problem in revising or removing foreign policy export controls once they are imposed is the need to relate relaxation of controls to some progress in achieving their initial foreign policy purposes. We found this to be the case in the export controls imposed on South Africa in 1978; adverse economic effects were a primary reason for relaxing the controls, but opposition to revising them without accompanying progress toward their foreign policy objectives dominated the decisionmaking process for several years.

LIMITS ON DATA AVAILABILITY TO SUPPORT ANALYSIS

More thorough analysis and calculation of economic effects, including secondary effects, is likely to be a difficult and time-consuming task. Commerce does not presently have some of the quantitative information needed for assessing economic costs. Data are available for items already subject to controls; however, detailed data are not available on exports of noncontrolled items, the extent and location of subcontractors, and expected future sales.

For goods and data already controlled, information on prior year sales—broken down into very specific categories—can be obtained from Commerce files of license applications. For items not subject to any export controls, information can be obtained from the Census Bureau's monthly export statistics, but not in such specific detail. The December 1981 Soviet oil and gas controls provide a good example of this situation. Commerce already had a validated license requirement in effect for exploration and production equipment and data. The new regulations embargoed exports in these categories and in the oil and gas transmission and refining categories. Commerce analysts said that they had no trouble determining the total 1981 value of exports in categories already controlled. However the Census Bureau export statistics for transmission and refining items were not sufficiently detailed and they had to estimate the value of exports that would be suspended by the new regulations. Commerce informed us, as it turned out, they now believe the value of sales in these categories was underestimated by a considerable margin.

Knowledge of upcoming major projects is also important in analyzing economic effects. When such information is known, it has been added to previous year trade statistics in developing economic cost estimates. Companies are not required to submit information on expected future sales, however, so it is difficult for Commerce analysts to consider this factor. Government knowledge of such future sales is spotty and is gathered from ongoing industry contacts, trade publications, and comments sometimes included in license applications for items already controlled.

Another limit in Commerce's information base concerns the impact of export controls on subcontractors, since Commerce does not require exporters applying for licenses to submit information of this kind. We found no evidence of analyses of the controls' effects on secondary suppliers in any of our case studies.

Another very important gap in Commerce's information base concerns the foreign availability of items that may be subjected to export controls. Foreign availability is important in assessing the effectiveness of proposed controls in denying exports to target countries, the potential for long-term losses of U.S. export markets, and the controls' economic impact. Although Commerce has been directed by the Export Administration Act to establish a capability to monitor and gather information on foreign availability, it has made only minimal progress in doing this.

Finally, the most difficult of adverse economic effects to quantity, and perhaps the most important to long-term U.S. export interests, is the impact of controls on the reputations of U.S. companies as reliable suppliers and the resulting adverse structural changes in trade patterns.

For Commerce to have all pertinent information on hand for use in preparing thorough economic analyses on export controls, the Government would have to require extensive data submissions from business. We do not believe such data collection is desirable or realistic.

OBSERVATIONS

As you know, the Export Administration Act of 1979 guides, but does not precisely limit, Presidential use of foreign policy export controls—permitting the President to exercise his judgment on a case-by-case basis. Changing the Act to try to improve decision making is possible, but implementation of these changes is likely to be extremely difficult and have limited benefits. For example, requiring additional data collection and economic analyses, and setting guideposts concerning the tolerable level of economic costs that might be incurred for potential foreign policy benefits is unlikely to improve decision making because of constraints on data collection and analysis and the predominance of foreign policy considerations. Improving the end-of-the-year economic analyses made as part of the controls extension process would probably also have only marginal value, given the importance that demonstrated progress in meeting foreign policy goals plays as the primary justification for relaxing controls. There is potential for revising the law to reduce the burden on the private sector through provisions safeguarding contract sanctity or limiting extraterritorial reach. However, such changes address only part of the basic problem of damage to U.S. companies' reputations as reliable suppliers and the resulting long-term structural changes in U.S. trade patterns.

Other possible changes would not necessarily contribute to better decision making as a general proposition; however, these changes could reduce the use of foreign policy export controls by restricting them or making them more cumbersome to use. Improving Commerce's foreign availability assessment capability and prohibiting the use of controls where foreign availability exists would, in effect, greatly reduce the President's ability to use export controls as a foreign policy tool. And requiring a public comment period before controls could be imposed would have a similar effect, because it is unlikely a President would want such a decision making process conducted publicly.

In our view, the key problem with foreign policy export controls is that their economic costs have been more visible than their political benefits, yet their foreign policy rationale has overridden such cost considerations. By demonstrating that the Administration did know the essential economic arguments against the use of export controls, our review helps to clarify the debate on foreign policy controls, in the sense that it refutes the premise that the Administration might have acted differently had it been aware of the probable economic costs, and it shifts the debate back to the usefulness of such foreign policy controls.

If the Congress believes it is desirable for the President to have this kind of foreign policy tool, then it may have to rely on the judgment of the President to impose controls only where a consensus exists that their foreign policy purposes can be achieved at a reasonable cost. We do not believe that fine tuning the Act to require more economic analysis will alter the decision made. On the other hand, if the Congress believes, as our major trading partners do, that unilateral foreign policy export controls are not an appropriate tool to achieve foreign policy goals, then it should eliminate this authority from the Act.

Mr. Chairman, this concludes my statement. I will be happy to answer any questions you or your Committee may have.

Senator MATHIAS. Thank you very much. That was a noble effort. Mr. Marcuss.

STATEMENT OF STANLEY J. MARCUSS, MILBANK, TWEED, HADLEY & McCLOY, WASHINGTON, D.C.

Mr. MARCUSS. Mr. Chairman, thank you very much.

I do not have a prepared statement, as I explained to your staff. My travel schedule made that impossible. But with your permission, I would like to submit a formal statement after my testimony.

Senator MATHIAS. Your statement will be received and made a part of the record.

Mr. MARCUSS. Thank you, Mr. Chairman.

Mr. Chairman, Congress has been engaged in this kind of effort every 3 or 4 years over at least the last 15 years. Every 2, 3, or 4 years the Congress has expressed a deep dissatisfaction with export controls, and has gone through a variety of different efforts to change the law and to change the administration of export controls, both national security controls and foreign policy controls.

Unfortunately, the fact of the matter is that none of those efforts has met with any significant success in my judgment. Congress has labored long and hard and has produced a very complicated statute that contains statements of perspective and points of view from all across the foreign policy and political spectrum, leaving essentially in the hands of the executive branch unbridled discretion to do what it wishes to do in the exercise of foreign policy export controls.

The latest example of that effort and the consequences was the exercise in 1979 to rewrite the Export Administration Act from top to bottom. It was rewritten, and included in the 1979 rewrite were substantial unprecedented new provisions imposing various criteria and procedures that were to be applied in the exercise of foreign policy export controls. For example, certain criteria were to be considered by the President before controls were to be imposed. An immediate report was to be made to Congress with respect to every exercise of foreign policy controls. Congress was to be consulted in advance in every possible instance. Business was to be consulted in advance. There were to be no controls if there were foreign availability unless the President decided otherwise, and all foreign policy controls were to expire every year, a sunset provision, if you will.

But I submit, Mr. Chairman, that that effort in 1979, as all efforts prior to that, have had very little consequence. The criteria are typically addressed after a decision has been made. The criteria are really discussed in terms largely of a rationalization for actions already decided upon. The annual reports to Congress, if they were to be perused, I think, would be judged by any impartial observer as pro forma reports.

Now, I say this without regard to Republican or Democratic administrations.

The immediate report that is to be made to Congress upon the exercise of control in the case, for example, of the pipeline sanctions, was made after the controls were lifted. That is not very immediate. Consultation with Congress and business with respect to pipeline sanctions and other matters with which I am familiar has largely been pro forma.

The main problem, Mr. Chairman, is that the statute has no teeth. It has no enforcement mechanism, and without an enforcement mechanism or mechanisms, whatever Congress does perhaps short of vigorous oversight will probably be no more successful this time around than it has been each time around in the last 15 years.

I, therefore, would recommend consideration of the following. One, I do support the so-called sanctity of contract notion as it has been established with respect to agricultural commodities. There are very few circumstances, if any, in which the performance of existing contracts would adversely affect the foreign policy of the United States. This, mind you, is not the national security area.

Second, I would strongly urge consideration of the appointment of what for lack of a better term I would call a technical advisory committee, not for purposes of reviewing the wisdom of a proposed foreign policy course of action, but for purposes of reviewing the specific order *that would be issued to implement a particular foreign policy export* control.

I would cite to you the oil and gas pipeline sanctions that were imposed in 1981 and 1982. I am convinced the administration has absolutely no idea what its orders implementing the President's decision would do. They were astonished when they discovered their breadth. A technical advisory committee in that regard, I think, would be very helpful.

Third and most important, I would say if the Congress is serious about criteria being considered, including questions of foreign availability, the only effective or the most effective way to insure that those criteria are in fact considered properly is for Congress to authorize an aggrieved party to go to court, just the way an aggrieved party can go to court with respect to environmental actions, not to block the basic substance of the action, but to insure that the factors that are required to be considered are in fact considered.

Now, lastly, as to the questions you raise in your letter: Should Congress impose limits on extraterritorial reach? Yes, absolutely. There are few, if any, circumstances in which the executive branch cannot achieve its objective by imposition of the law to U.S. persons in the United States, and it need not apply the law extraterritorially.

Second, you ask, what should the role of the Defense Department be in reviewing license applications with potential military applicability. I think the Defense Department's role is central in that regard, but the key thing is to keep the Defense Department in the role of assessing military implications and not making foreign policy judgments. I can cite you examples in which the line was crossed many times in the past.

Third, you ask, should the President be granted authority to limit imports? I would say yes in principle. I have argued that before, because it seems to me there is a basic unfairness in imposing the costs of foreign economic policy exclusively on exporters and not on importers. I say yes in principle, but I think there is a great danger of abuse, that such authority might be used for protectionist purposes.

Fourth, in what way can the act be improved to take into account foreign availability? My answer is judicial review.

Last, what role can the Foreign Relations Committee play in foreign policy export controls? Mr. Chairman, I think there is no substitute for effective, vigorous committee oversight. There has not been enough of that, in my judgment, in the past, and I think that is a key role for the Foreign Relations Committee to play.

Mr. Chairman, I would conclude by saying I think this is a serious issue. Export controls are a central part of U.S. foreign policy, but unbridled, ill-informed executive branch use of controls can impose serious costs and has serious dangers. I therefore urge that whatever Congress does with the Export Administration Act this time around, that it be resolute, clear, and precise, that it not simply transfer the debate back over to the executive branch to fight it out among competing bureaucracies for the next 3 or 4 years.

Thank you, Mr. Chairman.

[Mr. Marcuss' prepared statement follows:]

PREPARED STATEMENT OF STANLEY J. MARCUSS[1]

Mr. Chairman and members of the Committee, I am delighted to be able to respond to your invitation to testify today on the difficult and sometimes frustrating issues associated with the use of foreign policy export controls under the Export Administration Act. Unfortunately, this has become a perennial issue; every three or four years during the past fifteen years Congress has grappled with the issue of the proper role and use of foreign policy export controls. Regrettably, no acceptable balance has been struck over the years, and each time the Export Administration Act has come up for renewal, expressions of Congressional frustration and concern abound.

THE PREMISES OF FOREIGN POLICY CONTROLS

Foreign policy export controls are based on at least three premises:

(1) That they are effective in denying a target nation access to goods, services or technology;

(2) That they are effective in changing a target country's behavior; or

(3) That they are effective as a symbol of disapproval.

Experience, however, suggests that the foundation for these premises may be weak.

Export controls are effective in denying a target country access to supplies only when the implementing nation or nations have a monopoly, or near monopoly, on the restricted product. Although the United States was the sole source of many important technologies and products 20 years ago, this is no longer the case today. Many Western European or Japanese producers are more than willing to provide goods and services that American producers are prohibited from exporting. The recent Soviet pipeline sanctions are an example. No sooner was Caterpillar Tractor's license for the export of heavy earth-moving equipment revoked than the contract was given to Komatsu of Japan. Incidentally, that episode has gone a long way toward transferring world leadership in heavy earthmoving equipment from American to Japanese firms. This is not an isolated case; American controls on the export of soybeans in the early 1970's helped to establish Japanese-financed Brazilian farms as major world producers. There was, of course, a corresponding decrease in American market share.

Even if foreign policy export controls are effective in denying the target's access to supplies, they are seldom instrumental in causing the target to change what it regards as important foreign or domestic policies. Indeed, target countries often rally to oppose what they characterize as interference in their internal affairs, thereby undermining the controls through the use of alternative products or through the development of indigenous replacements.[2]

Finally, although export controls can constitute a visible expression of disapproval of another country's policies, they rapidly lose what little symbolic value they have if they are shown to be ineffective. What may be perceived as a symbol of disapproval at the outset may quickly become a symbol of ineffectiveness if the target country persists with impunity in its objectionable actions. That is not to suggest that the United States should never use export controls for symbolic purposes; but it must recognize that symbolic exercises may be double-edged swords.

ALTERNATIVE CONGRESSIONAL ROLES

If Congress is dissatisfied with past foreign policy export control exercises, the key question is what changes in law or in practice does it wish to make.

One possibility is yet another effort to amend the Export Administration Act so as to require executive branch consideration of new or more refined criteria or new or more refined procedures when foreign policy controls are being contemplated.

Another possibility is for Congress to adopt a more aggressive oversight posture.

A third possibility, now probably foreclosed by the Supreme Court's recent decision in *Immigration and Naturalization Service* v. *Chadha*, would be to require congressional concurrence with executive proposals prior to implementation of foreign policy controls.

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[1] Partner, Milbank, Tweed, Hadley & McCloy, formerly, Senior Deputy Assistant Secretary, U.S. Department of Commerce, and Counsel to the International Finance Subcommittee of the United States Senate.

[2] *See* Abbott, "Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s," 65 Minn. L. Rev. 739, 812–19 (1981).

Whatever it does, however, Congress must recognize that past attempts to impose some discipline upon the use of controls have generally failed. The rewrite of the Export Administration Act in 1979, for example, sought to increase the effectiveness of foreign policy controls while limiting the circumstances in which they might be imposed indiscriminately. Amendments adopted at that time specified criteria that the President must consider prior to imposing foreign policy export controls. These included: the probability that the controls would be successful, the reactions of other countries to the controls, the effect of the controls on U.S. export performance and the ability of the U.S. to enforce the controls. The President was required to report to Congress "immediately" upon the imposition of controls. Congress was to be consulted prior to imposing controls "in every possible instance." Consultation with appropriate industrial representatives was similarly required. The President was to take "all feasible steps" to prevent foreign availability from undermining U.S. controls. Finally, all foreign policy controls were to lapse and require renewal once a year. Had these provisions been strictly applied, they would have gone a long way toward assuaging the current concern over the use of foreign policy export controls.

Unfortunately, the 1979 reforms have made little, if any, difference. The criteria that are required to be considered are addressed, typically, only after a decision to impose controls has been made. The corresponding report is, therefore, little more than the rationalization of a foregone conclusion.[3] The "immediate" report to Congress that is required usually falls far short of being immediate. In the case of the pipeline sanctions, for example, the report to Congress was not made until after the sanctions had been lifted. The annual report to Congress is typically pro forma, and there is typically nothing that can pass as effective consultation with Congress or industry prior to the imposition of controls. Indeed, consultation with industry is often reduced to a few telephone calls made immediately prior to the imposition of controls.

The Export Administration Act is not and cannot be effective in accomplishing its goals because it has no teeth; it has no enforcement mechanism. Absent an enforcement mechanism, or vigorous congressional oversight, efforts at reform will fail, just as previous efforts at reform have failed. Accordingly, I recommend the following: (i) protection of existing contracts from interference by new export controls (a so-called "contract sanctity" provision), (ii) creation of a technical advisory committee to review the language and consequences of proposed export control orders and (iii) creation of an injunctive remedy available to injured parties when the President fails to abide by the procedures set forth in the statute.[4]

So far as contract sanctity is concerned, I propose that the Export Administration Act be amended to bar interference with existing contracts unless the adversely affected party is compensated for losses that he might bear. Determining which losses should give rise to a cause of action for compensation is no easy task, and it would probably be necessary to put some limits on the local compensation that could be recovered. Nonetheless, the principle is an important one and should be vigorously pursued.

Second, I propose the creation of what might be called, for lack of a better term, a technical advisory committee to review proposed export control orders so as to advise the Executive on their scope and legal and practical consequences prior to their promulgation. The advisory committee would have no authority to review the merits of the decision to impose controls; instead it would assist the executive branch in fashioning an order that is workable, enforceable and efficient in achieving its goal.

Third, if Congress is serious about requiring that specified procedures be followed and that specified criteria be considered prior to the implementation of controls, it must provide for recourse to the courts or some other arbiter in the event of the failure of the executive branch to comply with the law. Adversely affected parties should have the right to seek injunctive relief based upon the President's failure to comply with the Act's procedural requirements. This type of relief could be modeled upon the injunctive relief available when the executive branch fails to undertake a proper environmental impact study prior to instituting a program that significantly affects the quality of the human environment.[5] While not substantively changing requirements for the imposition of foreign policy controls, this proposal would create a strong incentive for the executive branch to follow the mandate of Congress.

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[3] *See*, e.g., Extension of Foreign Policy Export Controls, 47 Fed. Reg. 9201 (1982).

[4] *See* generally Staff of Senate Comm. on Foreign Relations and Cong. Research Service, 97th Cong., 2d Sess., "The Premises of East-West Commercial Relations: A Workshop," 56 (Comm. Print 1983) (statement of Stanley J. Marcuss). Therein I suggest twelve changes to the Export Administration Act.

OTHER CHANGES IN THE E.A.A.

Some other useful changes in the E.A.A. are suggested by the questions posed in your letter requesting me to testify.

(1) Congress should prohibit the application of foreign policy export controls extraterritorially. The Soviet pipeline sanctions demonstrated the severe tensions that the extraterritorial application of export controls can cause. There is no reason why unilateral foreign policy export control laws should continue to be applied outside U.S. territory. There are few, if any, instances in which the desired effect cannot be achieved by applying the law to U.S. persons only. For example, U.S. parent corporations can be directly required to prohibit their controlled foreign subsidiaries from making certain exports; it is not necessary to apply the law to the subsidiaries themselves. This proposal would minimize conflicts with the laws and policies of foreign nations. It would not significantly interfere with the ability of the United States to use export controls effectively. Indeed, it might improve the effectiveness of export controls by forcing the United States seriously to explore multilateral controls. If this proposal were adopted, U.S. law would more fully conform with international law, and American foreign subsidiaries would not be faced with the burden of dealing with conflicting laws.

(2) The role of the Department of Defense in approving or disapproving export controls should be strictly limited to exports capable of significant military application. The Department of Defense should not control foreign policy decisions. Distinguishing between foreign policy and national security controls is not always easy, but it is hard to justify the Soviet grain embargo after the invasion of Afghanistan as a national security control thus avoiding the foreign policy limitations of the law. Yet that is what was done.

(3) In principal, the President should have the power to limit imports to the same extent that he may limit exports. Adoption of such proposal would redress the fundamental unfairness of singling out U.S. exporters to bear the costs of certain foreign policy decisions. On the other hand, care must be taken to prevent the very real possibility that import control authority would be used for protectionist purposes.

(4) Currently, the E.A.A. requires consideration of foreign availabilitiy prior to the imposition of foreign policy or national security controls. By providing for judicial review of the President's imposition of controls, the foreign availability determination requirement would be strengthened.

(5) Finally, the Senate Foreign Relations Committee should seek to stimulate aggressive congressional oversight of foreign policy export controls either directly or through the committees that have direct jurisdiction over the Act.

CONCLUSIONS

Foreign policy-based export controls are an important part of U.S. foreign policy. Yet ill-informed and unchecked executive branch use of foreign policy controls can be a serious danger to U.S. foreign and economic policy. It can seriously strain relations with U.S. allies; imperil long-term U.S. commercial interests; and undermine overall U.S. foreign policy.

Foreign policy is an essential responsibility of Congress. I, therefore, urge that, in whatever Congress does with the Export Administration Act this time around, it be resolute, clear and precise and that it not merely transfer the debate from Congress to the executive branch as has happened all too often in the past.

Senator MATHIAS. Thank you, Mr. Marcuss.

Mr. Abbott.

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[5] Environmental impact statements are provided for in 42 U.S.C.A. § 4332 (West 1977). The judicial standard applied in cases in which failure to abide by the appropriate procedure is alleged in whether actions were taken "without observance of procedure required by law." 5 U.S.C.A. § 706(2)(D) (West 1977).

STATEMENT OF PROF. KENNETH W. ABBOTT, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, CHICAGO, ILL.

Mr. ABBOTT. Thank you, Mr. Chairman.

With your permission, I would like to make two general points that are not included in my written statement. I received this bill on Friday, and have now had a full weekend to peruse it and think about it, so I have two general points to add, and then will summarize my statement.

My general comments are these. First, it seems to me that no one side in this debate over export controls has a monopoly on the truth. Those who would strengthen national security controls or strengthen the President's hand in foreign policy have arguments in their favor. Those, like Senator Percy, who are concerned with weakening American industry, those who are concerned about alienating our allies, have strong arguments in their favor.

Renewal of the statute every few years is so difficult because these contending forces have to be balanced. In this light, I am very pleased to see that S. 979, the bill coming out of the Senate Banking Committee, is at least more moderate and balanced than the bills from which it is derived, the original bills introduced into that committee.

If I were asked to testify on those original bills, I would say they all included provisions that are truly dangerous. I think most of those provisions have been taken out.

My second general point is less positive than that one. It sort of echoes what Mr. Marcuss just said. As you know, this legislation is becoming very long, and it is becoming very complex. It has increasingly subtle criteria, and it has increasingly finely tuned procedures in it which makes a lot of work for lawyers, which is a good thing, but in the larger sense it may make the statute unworkable.

It is already becoming difficult for everyone concerned with the area to understand what the statute says, and I believe there is considerable feeling in the land that these increasingly complex provisions are creating a lot of paperwork but are not having much of any effect at all in either guiding or constraining the executive branch.

It seems to me that there is very soon going to come a time when Congress has to rethink this statute completely and adopt a much simpler, much cleaner approach. I have recommended that the Congress seriously consider repealing the foreign policy delegation of authority to the President. If the President needed that authority for nonemergency situations, he could come and request legislation. Mr. Marcuss and others have suggested judicial review, which sounds shocking, because it has never been a part of this program, but I do not think it would really be shocking at all. It would be a very useful device in a limited way.

Let me now mention two specific provisions in S. 979 that cause me particular concern, that are directly related to American foreign relations. First is the provision which would authorize the President to control imports from any country to which it controlled exports for foreign policy purposes. This is the provision intended to address the complaint that the export community bears an unfair share of the burden for the cost of economic sanctions.

The best way to proceed in considering that problem, it seems to me, would be to have a complete and objective study as to whether it is truly necessary or desirable for the President to have authority to impose a wide range of economic sanctions. He has such power in the International Emergency Economic Powers Act, but it is not clear to me that it is really necessary in the nonemergency situation. If it were determined, however, that the President should have a range of nonemergency powers, then we could pass appropriate legislation with appropriate constraints on the use of that authority.

First of all, a sufficient study of that need has not taken place, rather clearly, and aside from this, if you look at the provision in S. 979, it has a major flaw. Once the President's authority is triggered by the use of any foreign policy export control, he is immediately authorized to control any imports from that country subject to no constraint whatever that I can find in the language of the bill. All of the finely drafted criteria and procedures apply by their terms only to export controls. Not one of them applies to import controls. The President does not have to consider the effects on the American economy or any other criteria.

I will quickly note two further problems. First, under the General Agreement on Tariffs and Trade [GATT], there is a principle of nondiscrimination, often called the MFN principle, equal treatment for trade of other contracting parties. There are exceptions in the GATT for national security controls. There is no exception for general political trade controls. GATT has always been more concerned with restrictions on imports than restrictions on exports, and it seems to me this provision would raise problems.

Finally, as Mr. Marcuss noted, it seems to me this import control provision could become the focus for protectionist interests in the United States.

On my second point, how the bill deals with the problem of extraterritorial application of American export controls, or perhaps, more properly, how it fails to deal with that subject, let me say the following. We have heard already extraterritorial application of American controls has an adverse effect on foreign policy, adverse effect on the economy of the United States. It is important to note what happened in the pipeline case. Affected foreign governments were able to move in and take considered, official, formal, legal action by the executive branch of governments and simply block our controls.

There is a great risk that our controls will simply be ineffective. In spite of all of these problems, Congress has never seriously grappled with this problem. The statute includes the phrase "exports subject to the jurisdiction of the United States," does nothing to define that, and it does not indicate as a matter of policy how far our jurisdiction should be extended in light of the costs of extraterritorial regulation.

S. 979 has certain provisions on this that would require the President to make three separate determinations relevant to the problem of extraterritoriality. The heart is in the right place on these provisions, but they are simply not clear enough. They do not convey much meaning, and they leave almost complete flexibility in the executive branch to take the action they desire and justify it after the fact.

I see the red light, but let me just say something near and dear to your heart, Senator Mathias. I am sure you will give me the extra time.

Senator MATHIAS. It had better be good.

Mr. ABBOTT. I am currently preparing an article which is directed at Congress and recommends an approach to this extraterritoriality problem, an approach in two parts. The first part would be to establish a national commission to study the legal, economic, and political implications of extraterritorial trade controls. My article proposes a separate commission on this issue, but I know you have taken the lead in this and have recently introduced a bill for a more general study of extraterritorial application of American law. I would be pleased to see this study given to that commission.

The second part of my recommendation is that the Congress direct the President to enter into negotiations on this subject with our major trading partners, and draw some workable lines in negotiation. I do not see any other way that the problem is going to be resolved for the long run, and I am trying now to draft some workable formulations that could be used in those negotiations.

Thank you very much.

[Mr. Abbott's prepared statement follows:]

PREPARED STATEMENT OF PROF. KENNETH W. ABBOTT

Mr. Chairman, members of the Committee, my name is Kenneth Abbott. I am professor of law at Northwestern University School of Law in Chicago. My teaching and research are primarily in the area of international trade and international business law, and I have spent considerable time researching issues related to American export controls. I am here only out of interest in and concern for the subject, and am not representing any person or group.

I understand that this Committee is concerned with S. 979, the bill recently reported out by the Banking Committee, primarily from the point of view of its potential effects on the foreign relations of the United States. There are many provisions in this extensive bill that merit discussion and analysis. In the interest of time, however, I propose to focus this morning on two aspects of the bill that seem to me to have a particularly direct bearing on U.S. foreign relations. These are: (1) the provision of the bill that would delegate to the President authority to restrict imports from any country against which foreign policy export controls had been imposed; and (2) the manner in which the bill deals, or fails to deal, with the extraterritorial application of American export controls.

1. The provision in the bill that causes me the greatest concern is section 6(1), which authorizes the President to control imports from any country to which exports have been controlled for foreign policy purposes. This provision is an improvement on the original version, which would have required the use of import controls, but I still believe that it has been fully thought through.

The provision is intended to address the complaint that the exporting community bears an unfair share of the burden when the United States imposes economic sanctions against other countries. This is so because existing statutes give the President greater leeway to restrict exports than to restrict imports, financial transfers or other transactions. One way to deal with the problem is to curtail the President's authortiy to control exports for foreign policy purposes. The bill attempts to do that, in several ways, but the drafters of the bill apparenly thought it was also necessary to increase the President's authority to control imports. I believe, however, that Congress should act very cautiously indeed in considering whether to grant such authority.

The best way to proceed would be first to determine whether it is necessary or desirable for the President to be able to impose a range of economic sanctions, as he is authorized to do under the International Emergency Economic Powers Act. If it were determined that the President should have non-emergency power to restrict imports, the authority should be granted subject to appropriate constraints designed to minimize the costs of such restrictions.

Sufficient study of the need for expanded authority has not taken place. Aside from this, however, S. 979 has two contrasting flaws. In one sense, it does not go far enough: it only authorizes the President to control imports once he has already imposed foreign policy export controls. Thus the bill would unnecessarily limit Presidential flexibility and would also place an unnecessary burden on exporters.

In another, more important sense, the bill goes too far: Once the President's authority to control imports is triggered by the imposition of export controls, there is no constraint whatever on the use of that authority. The President is not required, for example, to make a determination as to the likelihood that the import controls would achieve their intended purpose. He is not required to consider the effects of the import controls on American importers, on consumers, on producers utilizing imported raw materials or components, or on inflation. All the constraints in the statute, in fact, apply only to controls on exports. It would not be enough, furthermore, simply to make the existing language applicable to import controls as well; separate provisions would have to be drafted.

Two further problems should also be noted. First, under the General Agreement on Tariffs and Trade [GATT], the United States is committed to the principle of non-discrimination—usually known as the MFN principle—in its trade with other contracting parties. There are exceptions in the GATT, notably for certain national security restrictions, but there is no general exception for political trade controls.

The same problem arises with respect to controls on exports. In the past, however, the GATT has refused to deal with political export controls, treating them as a question beyond the competence of the organization. Traditionally, however, the GATT has been primarily concerned with restrictions on imports. Political import controls, then, are somewhat more likely to run afoul of the GATT, or at least to become the subject of international criticism on legal and policy grounds. I am sure the point would be raised, for example, by the EEC. In any case, disregard of the non-discrimination principle weakens the principle generally, and may return to haunt the U.S. in the future.

Finally, the authority to restrict imports contemplated by this bill could well become a focus for industries in the United States seeking unwarranted protection from import competition. Again, the lack of constraints on the President's authority becomes an issue. For example, it appears that if the President were to control exports of vehicles and aircraft to certain Latin American nations in the interest of regional stability, he would automatically be authorized to restrict any imports from those same nations. Domestic producers might well seize on this opportunity to press for controls on competing products.

2. I move now to my second point, how the bill deals with the problem of extraterritoriality. The extraterritorial application of American export controls has a direct and adverse impact on the foreign relations of the United States. The recent controls aimed at the Soviet Union's Yamal pipeline provide a perfect illustration. These controls were expanded in 1982 to apply to foreign buyers of U.S.-origin goods and components, foreign licenses of U.S.-origin technology, and foreign affiliates of American firms. The result was a dramatic confrontation with our most important allies and trading partners and a significant threat to the cohesion of the Western alliance.

A particularly important aspect of this dispute was the mode of reaction of the affected foreign governments. In addition to the expected diplomatic responses, the governments of France and England took formal legal action to block the application of the American controls. This was not the isolated action of an individual court, as in the famous *Fruehauf* case, but the considered action of the executive branch of government. The legal tools necessary for similar blocking actions are available in many other countries, and it can be expected that the precedent set by England and France will be followed by other governments in years to come.

The economic costs of extraterritorial trade controls should also be noted. Even the risk of extraterritorial regulation makes U.S.-origin components and technology, as well as the products of foreign subsidiaries of American firms, relatively less attractive. It gives foreign business firms a clear incentive to substitute non-U.S. suppliers, if satisfactory alternatives can be found. It gives foreign governments a clear incentive to more closely regulate the activities, and even the entry, of American multinationals.

In spite of these and other adverse consequences, Congress has never seriously grappled with the problem of extraterritoriality. In 1977, Congress amended the Export Administration Act to authorize controls on exports "subject to the jurisdiction of the United States." But the Act does not define "the jurisdiction of the United States," nor does it indicate as a matter of policy how far American jurisdiction should be exercised, in light of the political and economic costs just described.

S. 979 would address the policy question by amending section 6(b) of the Act to require three separate Presidential determinations relating to extraterritoriality before any foreign policy export control could be imposed: (1) that foreign reactions are not likely to render the controls ineffective; (2) that foreign reactions are not likely to render the controls "counterproductive to U.S. foreign policy interests;" and (3) that the controls will not have an extraterritorial effect on friendly countries "adverse to overall U.S. foreign policy interests."

The first of these is aimed at the possibility of foreign blocking actions, and is a valuable addition. As to the other two requirements, their heart seems to be in the right place, but they are simply not as clear as they should be. Language like "counterproductive to U.S. foreign policy interests" and "adverse to overall U.S. foreign policy interests" just does not convey much precise meaning.

What the statute must convey is, first, that United States export controls should not violate international law, to the extent it can be determined; and second, that all of the costs of imposing extraterritorial controls, both political and economic, should be clearly recognized and weighed against the benefits that can realistically be expected from extraterritorial regulation. The language of S. 979 does not take account of all the potential costs and does not require that the costs and benefits of extraterritorial regulation be separately balanced. As a result, it neither guides nor constrains the President to any significant degree.

The contract sanctity provision in S. 979 might in practice eliminate many of the foreign complaints heard during the pipeline dispute. The language of that provision, however, also contains a number of ambiguities, and does nothing to resolve the issue of jurisdiction in situations where existing contracts are not affected.

In sum, while this bill would take several steps in a desirable direction there is more that Congress could do.

I am currently preparing an article that recommends a two-part approach. I first suggest that Congress establish a national commission to study the problem of extraterritoriality in the application of trade controls. I am proposing a commission that would focus solely on political trade controls, using as a model the proposal for an international antitrust commission put forward by Senator Mathias and former Senator Javits. I would be pleased, however, to see the subject entrusted to the more general study commission recently proposed by Senator Mathias.

I then recommend that Congress direct the President to enter into negotiations on the issue with our major trading partners, guided by the recommendations of the commission, I believe that the dispute over extraterritorial jurisdiction can be lastingly resolved only through negotiations. Ideally, negotiations would lead to the drawing of some workable lines and the elimination of at least some of the political conflict and economic distortions with which we must now contend, to the benefit of all concerned. My article will suggest several formulations for the drawing of workable lines that would not require the United States to sacrifice any of its essential interests. I would be pleased to provide the Committee with a draft of this proposal as soon as I have completed it.

That concludes my formal testimony, but I would be pleased to answer any questions.

ADDITIONAL COMMENTS ON S. 979, TO AMEND AND REAUTHORIZE THE EXPORT ADMINISTRATION ACT OF 1979, SUBMITTED BY KENNETH W. ABBOTT

With the permission of the Chairman, I wish to submit in written form several comments on S. 979 that were not included in my written statement submitted to the Committee on June 27, 1983:

1. To begin, I would like to make a very general comment on the progress of the legislative process in the Senate. No one side in the debate on export controls has a monopoly on the truth. Those who would strengthen national security

controls or give the President a strong hand in foreign policy have many arguments in their favor; so do those who are concerned that we not hamstring American industry or alienate our trading partners. Renewal of the export control legislation is always difficult, because these contending forces must be balanced. In this light, I am pleased to see that S. 979 has moderated the more extreme proposals put forward by the various factions. If I had been asked to comment on the original bills introduced in the Senate this session. I would have said they included some provisions that were truly dangerous. This bill causes me much less concern. The most extreme features have been moderated, and the bill contains some very positive features—including, notably:

A. The encouraging statement of policy in favor of vigorous scientific enterprise and free scientific communication;

B. Some improvements in the treatment of foreign availability—encouraging better information gathering, the presumption in favor of applicants' representations (for national security controls), consideration of foreign availability, in the militarily critical technologies list, and extenson of the "render ineffective" test of foreign availability to foreign policy controls;

C. Prior notification to Congress on the imposition of foreign policy controls; and

D. The foreign policy contract sanctity provision.

2. My second general point is less positive. As the members of the Committee well know, this legislation is becoming very long, very complex, with increasingly subtle criteria and finely tuned procedures. This makes work for lawyers, but in the larger sense it may make the Act unworkable.

It is already becoming difficult for exporters, executive branch officials, and even Members of Congress to understand. And there is considerable feeling that the increasingly complex provisions are creating additional paperwork, but are not having much effect in guiding or constraining the President.

To take one example, S. 979 would require the President to extend foreign policy controls every 6 months, instead of every year. That means an additional report will be filed, but I venture to suggest that it will have virtually no effect on how long particular controls remain in force. This sort of approach to regulation can eventually lead to disrespect for the law.

I believe there will soon come a time when Congress has to rethink the export control statute completely and come up with a much simpler, cleaner and more effective approach. (A) One approach previously tried in the context of controls on agricultural products—the legislative veto—no longer appears to be available. (B) I have recommended that Congress consider repealing the President's authority to impose foreign policy controls. Under this approach, the President would retain his national security authority and his wartime and emergency authority, and could request Congressional authority for nonemergency, peacetime foreign policy controls in specific situations. The hearing process would then be used to ensure that all interests were exposed and considered. (C) Several persons involved in the recent pipeline sanctions have recommended that the statute provide for judicial review of the imposition of foreign policy controls at the request of a firm affected by the controls. As I understand this proposal the court would not review the substantive wisdom of the decision to impose controls, but would only consider (i) whether the President or his delegee had before him a record of substantial evidence bearing on the criteria specified in the Act, and (ii) such matters as whether the choice of goods to be controlled was made capriciously or with an improper motive, such as the intent to damage a particular firm. Such limited judicial review would not be shocking at all and might prod the Executive branch to more thoroughly consider the details of its proposals. In truth, however, I believe such judicial review might be too limited to restrain the President from an excessive use of foreign policy controls.

At the hearing, I was asked what amendments to S. 979 members of the Committee should offer. I responded by mentioning several specific provisions that could be improved, including those discussed in my original statement, both of which bear directly on United States foreign relations. What I believe the members of the Committee should really do—now or at a later time—is to work for a thorough rethinking of the Act along these or other similar lines. Since the entire Act affects our foreign relations, as well as our international trade, this seems clearly within your province and your responsibility.

Senator MATHIAS. Thank you, Mr. Abbott.

Let me start out by reviving the famous question that Senator Baker propounded so often during the Watergate hearings. What did the President know and when did he know it?

Mr. Mendelowitz says that there was a wide understanding within the administration of exactly what the facts were with relation to the pipeline restrictions. Mr. Marcuss says, or at least I understood him to say, that he doesn't think the administration had any idea what the results of the pipeline sanction action would be.

Now, those seem to me to be somewhat contradictory states of mind. I wonder if you could enlighten the committee as to exactly what the level of sophistication of administration knowledge really is about these subjects.

Mr. **Mendelowitz**. The work that we did included discussions with senior administration officials, review of files, discussions with some 50 private sector business representatives, and review of material that was both in the public arena and information that is still classified.

Based on the full range of information that we reviewed, it is our judgment that the administration had—both from internal Government sources and communications from major exporters affected by the pipeline controls—information on hand before the imposition of the controls that assessed fairly accurately the direct consequences of the imposition of the controls, namely, lost exports and sales. What they did not have was quantitative analysis of secondary effects. We are unsure that those can be done in any event.

In addition, the administration had a fairly complete list of objections in terms of general propositions that the business community had with repect to the imposition of these unilateral controls.

Mr. **Marcuss**. Mr. Chairman, I am not privy to what precise information this administration had with respect to the pipeline sanctions and their primary and secondary consequences. I have something of a worm's eye view, and that is from a person who is in the private business and legal communities. I encountered numerous instances of secondary consequences that were simply unanticipated, or at least appear to have been unanticipated.

For example, the orders implementing the sanctions had consequences for oil refinery projects in Indonesia and in China and in North Africa, countries against which pipeline sanctions most assuredly were not directed. They had that consequence because the orders were so sweeping that they swept into their net secondary and tertiary suppliers to various countries that were the direct object of the sanction's orders.

Let me add one other point to the worm's eye viewpoint, and this comes from the perspective of someone who was responsible during a good part of the Carter administration for export controls. The pipeline sanctions, to be sure, were imposed explicitly in 1981, and again in 1982, but they clearly were the outgrowth of a fundamental foreign policy decision that was in the workings way back in 1977, and perhaps earlier, but at least as early as 1977, when some people in the administration began to believe that the United States should not in any way assist—or the West should not assist—the development of Soviet petroleum energy resources.

If you look back over the record, you will see from 1978, after the Shcharansky and Ginsburg trials, when oil and gas export controls were imposed for the first time, all the way up to Afghanistan and Poland, when the same issue was being addressed in different contexts, the whole drift and push was for a major foreign policy decision on the fundamental question of Soviet energy development.

Now, in that context, all I could testify to was that the particular facts as to secondary and tertiary consequences were generally regarded as of little consequence, and therefore not explored.

Senator **Mathias**. But in any event, what we are trying to do here this morning is to raise the level of sophisticated knowledge about what will happen when you apply these kinds of restrictions, would you not agree?

Mr. **Marcuss**. I agree. That is why when I step back and assess the mechanism that produces the most relevant information, it seems to me the mechanism or mechanisms are those which engage the parties that are most likely to be affected. At the moment, the statute does not provide for any meaningful way of engaging those parties.

Senator **Mathias**. That leads me to my next question, and I address this to each member of the panel. What would you do about this bill? As we stated at the outset, this committee has no authority to modify it, but as Members of the Senate, we can offer amendments when it comes to the Senate floor for debate. If you were in our position, what kind of amendments would you offer to the bill? I would like to hear from each of you on that subject.

Mr. **Mendelowitz**. I think the implication of the work that we did is that it is very difficult to insure better decisionmaking by requiring more analysis or more determinations. If the costs of foreign policy controls are your major concern, and they appear to be, then the type of amendments that are appropriate, I believe, are amendments that would directly reduce the cost of the application of foreign policy controls, such as contract sanctity. Or if you feel in any event that the costs are too high, no matter what type of amendments are possible, then consideration should be given to the elimination of foreign policy controls.

We really do not believe that it is realistic to provide avenues of additional information that are consistent with the operation of foreign policy controls. One of the problems we came across was that additional avenues of communication prior to the imposition of controls would in essence require the formulation of U.S. foreign policy in a public arena. We seem to find in the administration, and I think in all administrations, a great reluctance to do that. I think that is a primary reason why we have not seen prior consultations.

The information is getting through. It is being collected from diverse sources outside from the business community and inside from data sources within the Government. But we do not believe additional consultation, additional information, or additional determinations will result in consistently better decisions.

Mr. **Marcuss**. Mr. Chairman, I would say that Congress, having decided that the President should have the authority to impose controls for foreign policy purposes really needs to bite the bullet and decide whether it wishes to permit the President to exercise that control subject to no standards or criteria, or, on the other hand, whether it wishes that there be standards, criteria, or procedures.

That is a fundamental policy decision for the Congress to make, having decided, apparently, in 1979, and as confirmed by the drift of the bills that are now coming before the House and the Senate, that there should be foreign policy controls, that the President should have that authority, and that certain procedures should be followed in exercising that authority, and that certain criteria should be considered and applied.

The question before Congress, it seems to me, is the question of whether it is satisfied that those criteria and procedures will be applied. As I indicated in my testimony, if one looks at the statute and the experience, I think there is very little basis to be satisfied. Therefore, I would recommend two things, among others, as I indicated in my testimony.

One is that an aggrieved party have the ability to go to court, not to challenge the decision itself, but to say, Your Honor, the Congress said that these are the criteria that should be considered, these are the procedures that were to be followed, they were not followed, these criteria were not considered, and therefore we request that you require that the executive branch do so.

Now, I know that might strike some in the foreign policy sphere as quite a radical proposal. However, there is a precedent obviously in the environmental sphere. But it seems to me Congress cannot have it both ways. It cannot say that the President should do all these things every 3 or 4 years, and every 3 or 4 years say, we really mean it, and then not do anything to insure that they occur.

Senator MATHIAS. Thank you. Mr. Giffen?

Mr. GIFFEN. Mr. Chairman, I first started testifying on this act in 1969, 14 years ago. I have beeen coming down here regularly ever since. Somehow or another, the message just does not seem to be getting across from the American business community either to our Government or to this Congress. The simple fact is, there are two things the American business community is looking for. You can write any legislation you wish to, but ultimately it will be the American business community which will decide whether it is going to go into these markets or not, and the key and first item that it needs is a sanctity of contract provision that applies both to foreign policy and national securitiy controls.

If we cannot be assured when we enter into negotiations that those contracts, once licenses have been granted, are going to be allowed to be carried through, we are not going to enter into those negotiations. Dealing with planned economy countries takes an inordinately long amount of time to get a contract concluded. Our last transaction, we began in 1969, when you first began considering revising the Export Control Act of 1949. We did not sign the contract until 1979. The contract was 8,000 pages long, 23 volumes, and took 3 years, 8 months, and 1 day to negotiate.

We simply are not going to enter into any more of those transactions unless this Congress gives us a sanctity of contract provision that applies to both foreign policy and national security controls.

The second point that we believe is important is the elimination of foreign policy controls. We believe they are redundant and ineffective, as I pointed out in my formal testimony. More importantly, however, we believe that the Congress must give the executive branch some standard, some set of guidelines that it can use to determine which products and technologies should be exported, and which technology and products should not be exported under the national security controls.

Those are the two things we would like to see. The rest I think we will leave to the lawyers.

Senator MATHIAS. Professor Abbott?

Mr. ABBOTT. On that note, it seems to me, as Mr. Marcuss says, you have two choices in making amendments, and really perhaps you have only, practically speaking, at this stage of the process, one choice, and that is to tinker with some of the detailed provisions that are in the bill before the Senate. If you were to tinker, it seems to me you should be concerned with the two provisions that I discussed before, the provision on import controls under foreign policy, and you should be concerned with taking some clear action to resolve the extraterritoriality disputes instead of just letting them simmer until the next time there is a crisis.

It seems to me you should think very hard about several pages of enforcement provisions and new violations and new penalties of various sorts that are included in this bill, which it seems to me are going to divert enormous amounts of enforcement resources to the statute and are going to cause considerable irritation and harassment of innocent exporters. At least it is possible. I do not know that they really have been thought about as clearly as they should be.

And you might consider tinkering with the foreign availability language a little more. The section 5 foreign availability test, it seems to me, is moving toward requiring exact comparability between the product that is available abroad and the product that is available in the United States, which is not really the appropriate test.

If you want to think more broadly, and I do not know if there is time now, Congress really is going to have to bite the bullet, whether it wants to try to delegate authority to the President with some kind of criteria which probably will not work in constraining the executive branch's use of controls, and I am speaking mostly of foreign policy controls. The congressional veto provision apparently is not available to us any more. Several interests, not only me, have suggested repeal of the foreign policy authority. It seems to me it is really too late in the process to bring that up now, but some time it will have to be considered. The judicial review proposal may in a sense be emerging as a compromise between allowing the present system to go forward longer and repealing the President's authority.

The judicial review proposal at the initiation, the imposition of control stage, as I understand it, would require the executive branch, if it were challenged, to show that it had substantial evidence before it on the issues that the status calls for it to consider. That might be evaded just as easily as the present criteria are evaded, but at least it would be something new to consider.

Senator MATHIAS. Senator Percy.

The **CHAIRMAN**. Thank you, Mr. Chairman.

First, I want to express appreciation to Mr. Mendelowitz and the GAO for responding so completely to the request that I had made of GAO, by producing its report. It does again prove the great value of such independent reports to this committee. We just could not operate without that kind of objectivity.

The report's findings came to the conclusion, as I understand it, that the administration did not make strong efforts to determine economic costs, and did not in most sanction cases really consult with the business community in any meaningful way. Is that correct?

Mr. **MENDELOWITZ**. They did not consult in a meaningful way. We do feel they had substantial information available to them, both from internal Government data sources and from communications from the business community.

The **CHAIRMAN**. I would like to ask Mr. Giffen and anyone else who would like to comment to respond from the standpoint of the business community. GAO's testimony points out that the administration did have knowledge of the key economic arguments against export controls, as well as some details on direct export costs and effects on individual companies. What kind of information relevent to these costs did you believe the Government did not have, and would you have provided it, had you been consulted in advance of the controls?

Also, how much time would you have needed to provide such information, and would you have been willing to have that information made public?

Mr. **GIFFEN**. Senator, I believe in going right to the bottom line. I will give you several specifics. My basic opinion is that they did not have the information, although I do not have any special knowledge of that. The only thing I can point out is some examples to make my point clear.

To begin with, in 1978, when the oil and gas controls were put on, the administration so far as I know did not consult with the oil and gas manufacturers. The reason I can say that with some degree of knowledge is, Armco is the largest manufacturer of rigs in the Western World, and we were never asked any questions as to whether or not any parts of the rig that we manufacture or of an entire rig were available from any other source when, in fact, they are.

Let me give you another example. On the Novolipetsk Dynamo Steel project, we would have been quite willing to give information and did give information when asked about it, but that was only one project. Our larger projects, which total literally into the billions of dollars, we were never asked any questions about, and we would have been happy to supply that information had they asked it.

The **CHAIRMAN**. Is there any other comment?

[No response.]

The **CHAIRMAN**. Business representatives, certainly those in Illinois, constantly have said to me in recent years that America's reputation—American farmers, American exporters of manufactured goods, American companies—our reputation as a reliable supplier is literally being destroyed by these controls. They are not just affecting the countries that are embargoed. They are affecting all our customers. They all are saying, if that is the policy of the United States—to implement foreign policy through trade sanctions—then we had better consider whether we might ever have a disagreement with the United States which could mean that we would not get U.S. spare parts or whatever else we depend on the United States to supply.

Such uncertainty is doing damage to U.S. companies whose exports are not even subject to controls, from buyers in countries that are not now affected at all by export sanctions. If business had more opportunity to provide information on the costs of proposed control actions, would it be able to quantify these effects? Would it be willing to do it even if it had to reveal future trade strategies?

Mr. MARCUSS. Mr. Chairman, may I respond in part by alluding to what I said in my principal testimony, and that is, in the case of the pipeline sanctions, at least, there is no question in my mind but that the administration did not know of a number of very important secondary consequences flowing from the orders that were issued. Refinery projects in Indonesia, China, and North Africa, for example. These are countries that have nothing to do with the Soviet Union pipeline, and they were affected.

I know that was also the case in a wholly different context back in 1978 when we imposed export controls on exports to the South African military police. There were numerous circumstances in which foreign licensees and subsidiaries of American companies suddenly found themselves unable to complete existing contracts. The administration did not know anything about those possible consequences.

I have recommended that there be established a mechanism whereby proposed orders implementing Presidential decisions be subjected to technical review by those parties that are likely to be affected, not for the purpose of quantifying the consequence, not for the purpose of affecting or attempting to reverse a decision the President already has made, but for the purpose of permitting the bureaucrats who implement the decision to know exactly what the consequences will be so that when they write broad language and talk about persons subject to the jurisdiction of the United States or any party with an interest in the transaction at issue, and so forth and so on, they know what they are talking about.

I know in the case of the pipeline sanctions, and I know in the case of every other foreign policy export control decision in which I was ever involved, the decision goes to the President in terms of a fairly simple, straightforward set of propositions and options papers. Once a decision is made, the yes box is checked. The order then goes to the bureaucrats, who have to carry it out. They have to write words and language. They do that, in my judgment and in my experience, in a factual vacuum. I would like to see that changed.

The CHAIRMAN. I thank you.

Mr. Chairman, I would like to ask that the record be kept open for the rest of this week in the event that, as the witnesses reflect on some of the questions put to them by either the Chairman or myself, and if they want to incorporate their own responses to those questions, they may do so. We will keep the record open this week so that you can get your replies back in.

Senator MATHIAS. That suggestion, I think, is a good one. Several members of the committee who are not able to be here also have some questions, which we will include.

The Chairman. Fine. Inasmuch as you will not have a chance to testify after Acting Secretary Kenneth Dam appears, how would you respond to the concern the administration will be expressing that a required public comment period before control can be imposed would result in foreign policy decisionmaking being conducted in public? That is always a problem. We had that problem last week, when it came up in connection with the Adelman letter. What improvements in the business consultation process can you suggest that take into account this concern of the administration?

Mr. Marcuss. I would say nothing could be healthier than public debate over proposed foreign policy of the United States. There is nothing in my judgment better suited to providing the necessary political support for a major foreign policy initiative than for a fully informed public debate about the proposed decision. So I would simply disagree, respectfully, with the Secretary on that point.

Mr. Giffen. I would like to add that there are different forms of public discussion. I guess what most of us in the business community are concerned with, and the many members of this panel, is that the administration get the proper facts in front of them. There are different ways of doing that. One could be by public forum. Another way is to have discussions that do not necessarily have to hit the press every time that we have them, but I do agree with Mr. Marcuss that there is nothing healthier than a public forum.

The Chairman. Are the definitions of products and technology in the commodity controls clear enough to facilitate determination of the availability of comparable product and technology? Do they harmonize with existing international coding systems? What can be done to improve availability determination? Are the Senate bill provisions helpful in this regard? Professor Abbott?

Mr. Abbott. I will yield to the business representatives on the harmonization of the commodity control numbers.

The Chairman. I am just anxious to hear from my next door neighbor at Northwestern University.

Mr. Abbott. That is right, your constituent from the great State of Illinois, I may say. May I comment just briefly, instead of on the commodity control issue, to your last question, to which I was about to respond?

I would agree with the previous witnesses that public comment in most cases, perhaps in emergency situations, is not necessary or advisable, but there is a separate statute for that. In the normal case, I think public debate is advisable.

What I would add to their comments is, the assumption in your question was that additional consultation with the business community is what is required. I think that is true, but I would add that consultation with other groups is also advisable. There are people who are concerned with the effect of these actions on exporters, but it seems to me there are also people who are concerned with the legal aspects, with the effects on labor and on communities, people who are concerned with the effects on foreign relations also who should have an opportunity to comment which would not be provided by more or less off the record consultations with business.

The Chairman. You can supplement the record on that point, Mr. Giffen, if you wish. I would like to skip to another question that has been raised. Some American businesses have argued that the loss of the Soviet market because of foreign policy trade controls has generated competition in the global market that would not have otherwise developed, and has subsequently led to an overall decrease, an actual decrease, in American global market shares. Is this a valid point? Professor Abbott, maybe you could comment on that also.

Mr. GIFFEN. The first thing that I again want to reemphasize is that I really do not think the Congress or the American people understand, and that is that the foreign policy controls are really not necessary if there are no standards in the national security controls.

For example, with respect to the Afghan sanctions, many people thought that the licenses that were terminated were terminated for foreign policy purposes. In fact, they were terminated for national security purposes. Our license for the Novolipetsk Dynamo Steel facility was terminated for national security purposes, not for foreign policy purposes.

The fact is that if you draft adequate standards as to what should be controlled for national security purposes, you are not going to have a problem. If you do not, you are going to have a problem.

The CHAIRMAN. Professor Abbott?

Mr. ABBOTT. The problem with assessing the economic costs is very difficult, because there is so much that I am afraid is not quantifiable, and the tendency is to disregard them because they are not quantifiable. It is easy to focus on lost sales to the United States. It is a lot less easy to focus on buyers in third countries who will be less willing to purchase American components for fear of extraterritorial controls or licensees who are less willing to take American tehnology for fear of product technology controls, or foreign countries that are less willing to admit American subsidiaries or regulate them more closely because they are afraid that they will be regulated.

The market share question that you raise in an industry like that in which Caterpillar is engaged, the fact is, at least in theory, that if Caterpillar loses a very large order like the Soviet order for pipelayers to its direct competitor Komatsu, Komatsu will get economies of scale out of that production that will help it compete in every sale and every market thereafter in the world so long as they are making the same pipelayer. I do not know how to quantify those things, but they should be considered.

Mr. GIFFEN. Specifically, they should be quantified. The Soviets have listed nine projects to us that were specifically turned down or will be turned down to American companies because of the sanctions, and look at the types of equipment that are going to other companies and helping those other companies gain market share. Oilfield equipment, electronic telephone facilities, bulldozers, pipelayers, and automatic pumps, gas lift equipment, oil rigs, gas pipeline equipment, a second line for the Kama truck factory, five plants to produce methanol, an aluminum manufacturing facility.

Mr. Chairman, that is technology and products that this country developed and we should be competitive. When other companies in other countries get those contracts with the Soviets, it helps them, and helps them to gain market share throughout the world.

The CHAIRMAN. Thank you very much. I have one last question. How would each of you see a newly reorganized trade department helping to make sure we had better economic analyses in the future? Would that provide some assistance? Would a trade department have made any difference in whether a policy of sanctions was initiated, better consultations were held, or terms were modified, in the case of controls imposed on the Soviets?

Mr. GIFFEN. You are talking about an Office of Strategic Trade and not a reorganized Department of International Trade and Industry?

The CHAIRMAN. No; a reorganized department. In other words, would the proposal of the administration for reorganizing our Commerce Department and taking the U.S. Trade Office out of the White House, to create one Department of International Trade—would that in any way have had an effect upon some of the concerns that you have expressed?

Mr. GIFFEN. Personally I think it would have a more positive effect, and I support that.

The CHAIRMAN. It would have a positive effect?

Mr. GIFFEN. Yes; it would have a positive effect, but at the same time until you include that sanctity of contract provision I will not feel comfortable doing business in either China or Russia or any other countries of Eastern Europe.

Mr. MARCUSS. I think the principal impact, Mr. Chairman, would be that a Department of Trade that had as its head a person who did not have to worry about a large number of unrelated peripheral items might have more authority within administration councils.

The CHAIRMAN. Thank you very much.

Mr. Chairman, we all concur that, where we have unique technology which could strengthen the military of the Soviet Union, we are not about to provide that unique technology to them. If in concert with our allies we can work to prevent them from getting technology that will add to their military strength, I do not know of any company that has ever opposed that kind of control.

But certainly, even though this committee does not have direct jurisdiction over this bill, I intend to work with you and other members of this committee to recommend specific amendments to S. 979 on the Senate floor. I think that amendments may be warranted in several areas, including import sanctions and extraterritorial controls.

I want again to commend on the record, Senator Mathias, the extensive hearings that you held sometime ago on extraterritorial controls. I learned a lot from those and I trust we all learned a lot as a result of them. I think they contributed to the final decision the President made.

Thank you very much.

Senator MATHIAS. Before Senator Percy leaves, since the great State of Illinois has come into this issue——

The CHAIRMAN. I knew we could work it in somehow.

Senator MATHIAS. Let me ask Professor Abbott whether the Chicago Council on Foreign Relations has published its poll on foreign policy attitudes in the United States. One item in that poll shows that a majority of the American people favor increased trade with the Soviet

Union, with the exception of the area that Senator Percy has just mentioned—high technology which affects defense preparedness.

How do you think this bill would comport with that public mood which is disclosed by the Chicago Council's poll?

Mr. **Abbott.** If that mood is accurate, it seems to me that the bill could conform to it, or it could not. It depends on how it is administered and, like many previous versions of this act, it leaves considerable flexibility.

I understand this bill is a sort of a compromise between one bill that was intended to tighten national security controls and another bill that was intended to make more flexible foreign policy controls. If that were actually done and national security controls were constrained to militarily critical technologies and related products, and foreign policy controls were constrained in their implementation, I think the results would be very beneficial.

It seems to me there is still enough play in the joints of this bill, however, that if another situation came up where the Executive wanted to use more extensive controls they would still have the authority to do so.

Senator **Mathias.** Let me ask Mr. Giffen how serious he estimates the damage to U.S. business from procedural delays and license rejections in terms of sales lost and reduction in market share.

Does a significant part of that cost involve exports that are needlessly lost through license requirements on products that need not be controlled or that are readily available from foreign sources?

Mr. **Giffen.** Again I will turn to specifics. The answer is yes. Let me give you an example.

In November 1982 we received an inquiry from the Soviets to buy oilfield pipe. Every competitor of the United States supplies oilfield pipe to the Soviet Union. As you may be aware, the oilfield country tubular good market dropped drastically in April 1982, when most of the mills went from 100 percent capacity to zero capacity.

When we received the inquiry in November 1982 we were quite pleased. The Soviets stated they were interested, seriously interested, in purchasing substantial quantities of pipe. We did not receive a license through November, December, January, and February, and it was not until we began testifying on this bill in February and March that suddenly we received our export licenses when we used that example in our testimony.

However, of course, as you can imagine, by that time the contracts had already gone to Western Europe and Japan. So I can state that there are some very real cases where American business has lost the opportunities because of these sanctions or even the threat of the sanctions.

Senator **Mathias.** That leads me to a question for Mr. Marcuss. Do any of our major international competitors use foreign policy control measures that are similar to those in existing law or to those in this proposed extension?

Mr. **Marcuss.** That is a very interesting question, one that is difficult to answer. I think the general answer would be no, if one excludes the Arab boycott against Israel from that answer. There are many who would regard that boycott as a trade sanction similar to the kinds of sanctions the United States uses, but I think by and large the answer is no.

Senator MATHIAS. Mr. Giffen says that he is not going to do business in this area, that it is not worthwhile unless there is contract sanctity. Let me ask you and perhaps Professor Abbott, too, whether contract sanctity is a useful and desirable modification for the Congress to make in the foreign policy control authority.

Mr. MARCUSS. I am sorry, Mr. Chairman. Was that addressed to me?

Senator MATHIAS. Yes, and perhaps Professor Abbott would like to comment on that, too.

Mr. MARCUSS. I believe in principle in the notion of sanctity of contract with respect to the imposition of foreign policy export controls. I do believe there may be circumstances in which it may be necessary to interfere in some way with an existing contract for an important foreign policy reason, which at the moment I could not articulate because I could not articulate what that might be.

Very much obviously would depend upon the facts. Therefore, I would think it desirable to have in the statute a provision establishing the principle of contract sanctity providing an escape hatch under very tight constraints involving close consultation with the Congress.

Senator MATHIAS. Professor Abbott.

Mr. ABBOTT. I am inclined to agree with the desirability of the provision. I think it would be a mistake myself to put a loophole into this statute which would rapidly become a barn door, I believe, like many of the other loopholes in the statute.

It seems to me a satisfactory out is available through the IEEPA, the emergency statute, in case existing contracts had to be broken.

I just add one other point on the provision in the bill. It seems to me considerable work could be done to clarify that provision in its application to extraterritorial controls in case there are ever any more imposed. It is simply unclear as to what kind of foreign transactions should be protected and should not be protected or would be protected under that provision.

Mr. GIFFEN. Mr. Chairman, may I add one comment? I am proposing not only that that sanctity of contract provision be applied to foreign policy controls but also to national security controls. It has to be both. Neither the Soviets nor the American business community are going to conduct long-term trade without a sanctity of contract provision.

Mr. MENDELOWITZ. Mr. Chairman, the business representatives we spoke to uniformly favored contract sanctity as a provision in the newly reauthorized legislation, but I would like to emphasize that that only addresses part of the problem.

Mr. Giffen described a very long and drawnout negotiating process with the Soviet Union in which substantial funds and resources were invested and negotiations that may go on for 2, 3, or 4 years. There is nothing in contract sanctity that would present any protection to Mr. Giffen's firm should the sanctions be applied the day before or the week before or even the year before the contract was actually signed.

Mr. GIFFEN. I would like to respond to that. You have to understand that the negotiation process takes years. However, the execution of the contract would have taken 5 to 10 years. All I am trying to point out is that we are not going to commence the effort to enter into these contracts if, once having obtained the contract, we then get ourselves into a position where they can be terminated midway through the process.

How do you get back $350 million of equipment that has been delivered and is sitting in some Soviet dock or some Soviet location?

Senator MATHIAS. How do you like Professor Abbott's suggestion?

Mr. GIFFEN. I think Professor Abbott's suggestion with respect to foreign policy controls is fine, and I support it as long as you add in the sanctity of contract provision in the national security controls.

Senator MATHIAS. But without a loophole for the President directly to exercise, but to be independently determined? Is that what I understand?

Mr. ABBOTT. I was responding to Mr. Marcuss' proposal that there be a loophole added to the provision for foreign policy control that is in S. 979. It seems to me that would weaken it dangerously and we should rely on emergency statutes for that out in unusual situations.

Senator MATHIAS. Only when there was a proclamation of emergency?

Mr. GIFFEN. Or, Mr. Chairman, you can put into your statute the things that are completely compatible with normal commercial contracts, namely something akin to force majeure.

Senator MATHIAS. I thank you all very much. It is now 11:30, when we had proposed to terminate this panel. We have carried on extensively. In compliance with the chairman's suggestion, we will hold the record open for a week. Senator Boschwitz had specifically asked for permission to file some questions for your written response, and if you, upon reflection, have further thoughts that you would like to offer the committee, we would be very grateful to have them.

Mr. Marcuss, we will look forward to receiving your written statement for the record.

Mr. MARCUSS. Thank you, Mr. Chairman.

Senator MATHIAS. Thank you all. I hope you can stay for the Acting Secretary's testimony.

[Pause.]

Secretary MATHIAS. The committee will come to order. We are honored to have with us today the Acting Secretary of State, Mr. Kenneth Dam. Mr. Secretary, please proceed as you wish.

STATEMENT OF HON. KENNETH W. DAM, DEPUTY SECRETARY OF STATE, ACCOMPANIED BY WILLIAM SCHNEIDER, JR., UNDER SECRETARY OF STATE FOR SECURITY ASSISTANCE, SCIENCE AND TECHNOLOGY

Mr. DAM. Thank you very much. I am pleased to be here. I should like to read my full statement, if that is agreeable to you, because we are dealing with some very technical points involving the difference between the different bills. We tried to keep it short and address those differences that we think are of the greatest consequence.

Senator MATHIAS. If that is the way you would like to proceed, we are happy to have it that way.

Mr. DAM. Thank you, Mr. Chairman.

I am pleased to be able to discuss with the Committee on Foreign Relations the important foreign policy issues raised by the current debate on the reauthorization of the Export Administration Act of 1979. We recognize and appreciate the committee's clear interest in the development and implementation of U.S. export control policy.

The bills currently before the Congress differ markedly in approach and content from both the present act and the administration's proposal for reauthorization. The present act, in our opinion, strikes in adequate balance between the need to support our fundamental foreign policy and national security interests and the need to maintain our competitive position in world trade.

The amendments contained in the administration's proposal were designed to refine that balance. I know that the bills currently before the House and Senate share this objective. In some cases, however, they tip the scales in ways that would leave the President without the necessary flexibility to respond effectively to the dictates of international events.

Accordingly, I should like to focus my remarks today on the following provisions: contract sanctity, the authority to reach activities abroad; the criteria of the foreign policy control; import controls and import sanctions; and a series of issues related to the multilateral export control process.

The administration's contract sanctity proposal was designed to protect the hard-earned international reputation of our exporters while retaining sufficient Presidential flexibility to respond to international events. As a result, our proposal would exempt from foreign policy controls a large class of export sales contracts unless the President determined that it was in the "overriding national interest" to include such contracts.

In contrast, the Senate provision on contract sanctity contains no such exception. That provision would eliminate Presidential authority to impose foreign policy controls on existing contracts. It is important to understand the practical effect of such a limitation on the conduct of our foreign policy.

In 1978, the United States approved the export of truck engine assembly line plants to the Soviet Union. In 1979, trucks built with U.S. equipment carried Soviet troops during the brutal invasion of Afghanistan. This was an instance where the "overriding national interest" in opposing such brutal aggression required the imposition of controls on an existing contract.

But the inflexible rule proposed in the Senate bill would not have permitted a President to halt, as President Carter eventually did, the flow of U.S. material to support the Soviet war effort. Consequently, we oppose the ironclad rule contained in the Senate bill.

A second major issue debated in the renewal process has been the authority in the present act which allows us to control certain types of overseas activity in order to prevent evasion of our foreign policy controls. Both Senate and House proposals address the issue of the so-called extraterritorial reach of the act, but in very different ways.

The House bill would limit the impact of foreign policy controls to "the exportation from the United States of any goods, technology, or other information produced in the United States."

The United States has long asserted jurisdiction over certain activities abroad, such as those involving the reexport of U.S. origin goods. The House version could be read to eliminate even that authority, which is necessary to insure that export controls are not circumvented by shipment through third countries.

We recognize, of course, the potential conflicts that the assertion of this jurisdiction can involve. Our allies have made it abundantly clear, for instance, that they object strenuously to the assertion of U.S. jurisdiction over the subsidiaries of U.S. corporations within their territory.

The administration proposal seeks to allay those concerns by making a clear statement that it is the policy of the United States, "when imposing new foreign policy controls to minimize the impact on preexisting contracts and on business activities in allied or other friendly countries to the extent consistent with the underlying purpose of the controls."

But minimizing the impact of controls on our allies is only a partial solution to the issue of extraterritoriality, or conflicts of jurisdiction, as it is more properly called. As I stated before the American Society of International Law, conflicts of jurisdiction are most often grounded in conflicts of national policy. As a result, the most effective method of eliminating conflicts of jurisdiction is to work toward harmonizing our policies. This may not make the legal disputes go away, but it will surely make them less divisive.

Let me turn next to criteria for foreign policy controls. The Senate Banking Committee makes "extraterritoriality" the subject of one of the determinations the President would be required to make prior to imposing foreign policy controls. The Senate bill would require the President to determine that the controls "will not have extraterritorial effect on countries friendly to the United States adverse to overall U.S. foreign policy interests."

That bill also would require the President to determine, prior to the imposition of foreign policy controls, that the benefits to be derived from the controls exceed the cost to the export performance of the United States, to our competitive position, to our reputation as a supplier of goods and technology, and to individual U.S. companies, their employees, and their communities.

It is our understanding that the Senate bill, in requiring the President to make determinations of this sort, intended to discourage the use of the Export Administration Act to control exports for foreign policy purposes. Although we understand the motivations behind this effort, we question the form it is taking.

We believe that the President needs authority to impose export controls to advance the major foreign policy interests of this country. Accordingly, the President should not be bound by an ever-growing series of procedural restrictions which inhibit his ability to act quickly and flexibly in the face of rapidly changing international circumstances.

Nor should he be bound in ways that encourage the use of other authority, such as the International Emergency Economic Powers Act, better used only in the most exceptional circumstances.

The Senate bill also includes two provisions relating to the authority to control imports. The first is the discretionary authority to impose import controls against countries under the foreign policy export control authority. The second is the authority to ban imports from companies abroad found to be in violation of U.S. national security or foreign export control regulations.

The arguments against import controls on countries in conjunction with the foreign policy export controls are threefold. First, it is inconsistent to provide such broad authority for the control of imports when the act imposes strict controls on the use of export authority.

Second, the use of this authority to impose restrictions on imports for foreign policy reasons raises problems in terms of our GATT obligations. Last, and most important, we view this provision as providing a dangerous new avenue for protectionist pressures.

Export control authority for foreign policy purposes is exercised in one form or another with respect to most countries of the world. Consequently, the authority to impose import controls could, if used to its permissible limits, significantly disrupt our trade with other countries and our foreign policy objectives in general.

With regard to the provision concerning import sanctions against companies, I want to emphasize that the administration's proposal included a request for the authority to impose import sanctions only against violators of U.S. national security controls.

Our rationale was straightforward: To deny the entire American market to companies abroad that seek to reexport U.S. goods and technology in violation of our national security controls. Security controls are an area of general multilateral consensus among our allies, meaning there is a reduced risk of any conflict of jurisdiction.

We have assured our allies that the administration's proposal was purely an enforcement tool that can support our common efforts in strengthening controls for security purposes.

The Senate bill, on the other hand, includes a much broader grant of authority. In essence, the Senate provision would authorize import sanctions against foreign firms not only for violators of U.S. law but also for violators of foreign COCOM-related regulations. Consequently, it would appear to reach firms that have no jurisdictional ties with the United States.

Our allies have protested this provision in the strongest way. They legitimately feel that import sanctions of the sort proposed by the Senate go beyond any attempt merely to reinforce our reexport controls. Because of the ramifications this proposal might have on the international trading system and our economic relations in general, we strongly recommend that the Senate import sanctions provision be scaled back to comport with the administration proposal.

Finally, I would like to comment on a series of issues concerning the multilateral export control process as carried out by the Coordinating Committee, commonly known as COCOM.

Much of the debate on both sides of Congress has centered on the continuing efficacy of the multilateral export control process in which the United States and its allies participate. COCOM, for all its limitations, has been for over 30 years an extremely important part of our national security and the security of our alliance as well.

Nevertheless, we recognize the need to strengthen our common efforts and the recent COCOM high level meeting reinforced our work toward that end. Indeed, we are now engaged in an ongoing effort to harmonize national licensing policies, coordinate our enforcement activities, and provide for greater staff support to the COCOM Secretariat.

The Senate bill would require the President to negotiate for the establishment of COCOM as a treaty organization. We oppose this amendment. The substantive progress we have made in COCOM and the widely recognized unwillingness of our allies to agree to formalize COCOM in that manner lead us to believe that the risks embodied in the treaty approach outweigh the benefits.

If we push the treaty approach, we could precipitate the withdrawal of certain members of the Coordinating Committee or end up with a treaty so burdened with exceptions that it would prove ineffective. In either case, we would have sacrificed the flexibility and consensus of COCOM for the sake of form.

In a related matter, both the Senate and House bills attempt to decontrol in varying degrees the export of security items to buyers in other COCOM countries. We appreciate the attractiveness of that approach but think it is premature.

It is true that we have a multilateral consensus on many items in COCOM and on the surface there would appear to be little need to require U.S. exporters to apply for licenses for exports to COCOM destinations. As I noted above, the administration has actively pursued efforts to encourage the harmonization of national licensing procedures and strengthen our joint enforcement efforts through information sharing and other means.

It would be premature, however, to decontrol exports to other COCOM countries. Removal of licensing requirements simply would not permit us to effectively manage the risks of diversion or prevent exports to suspect end users. Most of the data which underlie our enforcement efforts are generated by the licensing process.

In that regard, I would add that our OCOM partners require licenses for intra-COCOM exports. We feel that decontrol would be regarded as a radical departure from our previous positions, although it is difficult to judge what implications the reactions of our partners might have for the COCOM process as a whole.

In conclusion, let me stress that we are most interested in working with the committee and the Congress to formulate an effective and adequately balanced Export Administration Act. The debate over renewal of the EAA has produced an extremely useful discussion which we will continue to pursue of how the Congress and the Executive can best address the difficult and frequently competing interests involved.

In that regard, I would be happy to answer any questions you may have. Thank you very much.

Senator **Mathias**. Thank you. Chairman Percy.

The **Chairman**. Thank you very much, Mr. Chairman. Secretary Dam, the major reason given by administration officials for the general lack of business consultation prior to control action has been the need for secrecy to prevent leaks to the news media which might dilute the foreign policy impact of the control decisions. We discussed this with our previous panel. Do you believe such secrecy is essential to the controls decisionmaking process, and if so how can there ever be meaningful business consultations carried out?

Mr. DAM. I believe it may be important in some cases, but I would say in general it is not necessary. I believe that prior administration witnesses have indicated their intention to have much fuller consultation with the Congress and recognize that the process of consultation has not really been as good as it should of been in a few cases in the past.

I do think, however, that one must be careful about procedural limitations that require too much time to react. I particularly would think of such things as requiring determinations that have to be furnished in writing—indeed including the possibility of judicial review—before any kind of action can be taken.

There are times when it is important to show that the United States can act promptly, so somewhere in the middle there has to be, in my view, some kind of balance.

The CHAIRMAN. You said in your remarks that we have made progress in COCOM. Could you expand a little bit on what progress specifically has been made and what benchmarks can you tell us about that would indicate substantial progress?

Mr. DAM. I have with me today Under Secretary Schneider who leads our effort in COCOM and who has been attending all of its major meetings including the high level meeting. I wonder whether it would be permissible for him to address himself to that question, because he can speak from first-hand experience.

Would that be satisfactory?

The CHAIRMAN. Very good. Thank you.

Mr. SCHNEIDER. Thank you, Mr. Chairman. We have had, as Secretary Dam indicated, our second high-level meeting at the end of April which was intended to bring together all of the political leadership in the member countries to propel the list review and related matters concerning licensing to a conclusion.

We've agreed on a series of meetings that are intended to accomplish certain objectives which were agreed to by the parties. I can provide for the record on a classified basis the details of what we have agreed to in as much detail as you like.

There is an agreement among the parties——

The CHAIRMAN. We would like to have that classified memorandum.

Mr. SCHNEIDER. We will provide it.

[The information referred to is classified and is retained in committee files.]

Mr. SCHNEIDER. There is agreement among the parties to provide public characterization of the content of the agreement made, but I would say in general terms we have made very good progress on this review both before the Williamsburg conference and subsequent to that.

The CHAIRMAN. Could we have your analysis of the situation that we might face, if we are trying to force treaty status for COCOM when our allies actually might not agree or would not agree? What is the probability that we could actually establish it at a treaty level?

Mr. **Schneider.** I think it would be very difficult to do because during the course of the informal discussions that I had at the COCOM meeting at the end of April there was great nervousness that some in the United States might push this concept. I think the indication was fairly widespread that this would meet with very considerable resistance.

The **Chairman.** We want to strengthen COCOM but we want to do so in what we consider a practical and speedy way. We, therefore, provided $2 million of additional funds if they are needed to strengthen the system process. But I am somewhat dubious about whether a treaty approach will actually succeed.

Secretary Dam, you and I have talked about the importance of the State Department assuming a degree of responsibility for international economic policies that protect our inflow of raw materials, and our outflow of exports. That is why I introduced the legislation originally to create a full-time Under Secretary of State for Economic Affairs.

We did not have one before, and I felt we ought to raise that to a high level and make certain the State Department had a charter that was very clear as to its responsibility for improving our trade. I am very grateful for the positive actions that have been taken under Secretary Shultz to see that we do recognize trade as a very strong element of our total economic strength.

Is the State Department trying to keep track of instances where foreign governments or businesses have been unwilling to procure from U.S. suppliers because they fear supply interruptions due to foreign policy controls? What can be done to restore their confidence in U.S. suppliers?

What is the State Department now doing to keep track of instances where we are getting a reputation as an unreliable supplier?

Mr. **Dam.** Senator, first of all let me say that I agree with what you are saying. I think it is incumbent upon the Department of State to play a strong role in assuring that the United States is regarded as a reliable supplier. Certainly our ability to export abroad is fundamental to our strength economically and thereby ultimately to our national security strength.

I have asked that we try to collect the evidence on this subject. Unfortunately by the very nature of it, it is somewhat anecdotal and often one is provided information simultaneously with a plea not to disclose it because of the very nature of things that we are talking about—situations in which a sale was not made, so to speak. So it is a little difficult to evaluate the evidence, and certainly statistically it wouldn't be possible to do so.

It is basically anecdotal evidence and it is not as much as what I am sure really reflects the true situation, because we are talking about things like components in larger projects or larger products and so forth.

The **Chairman.** Another area that the administration has not made a recommendation to us on is the public comment area. It is almost standard governmental procedure that when the most minor regulation is put in, there is an opportunity for public comment.

It goes in the public register. There is a public comment period so that we know what impact we are having. We are talking about imposing controls now that might be the life of an industry or the life of a particular company, and yet the administration bill does not provide for a public comment period before controls are imposed.

What exactly are the administration's objections to this? Are there any instances that you can envision when it would be desirable to have a public comment period before the controls are actually imposed?

Mr. DAM. I think there are circumstances in which it might be possible to have a public comment. I do think that the possibility of acting with some speed is important where speed is essential. The United States must be able in those situations where foreign policy controls are imposed to put on the record—to put before the world—what the U.S. attitude is.

I think it is important in those situations that it be done promptly. The one thing we must watch out for is the notion of having to make the kinds of findings that might be appropriate for an independent regulatory agency and then perhaps even have judicial review.

Frankly, I don't think that the President of the United States, in exercising his authority provided by statute, or buttressed by statutory authority from the Congress, should be viewed like an independent regulatory agency. That is not what the conduct for foreign policy in sensitive matters is about.

That said, of course, it is desirable to have the values of public comment because one often learns something. One comes across aspects of the question that one might not otherwise have seen.

The CHAIRMAN. My final question concerns the psychology of the whole trade controls issue which we really have to take into account. We have now had enough experience to know that a number of administrations psychologically have felt they have done something significant for foreign policy by invoking trade controls.

They have reacted to Afghanistan. They have done something about Poland, where we are very concerned. When we feel we have to do something, we impose sanctions. We impose controls.

Generally speaking I think the psychological impact of U.S. controls on our adversaries is that they get their backs up. It is just like trying to use the leverage of our aid with an ally. Sometimes you find that they are going to defy you as an ally, all the more as an adversary. They are not going to be dictated to. They will go out of their way to prove and demonstrate that they can get along without the American product, that they can do it some other way. They will always find someone, except under the most extreme circumstances, who will sell it to them. Therefore, we have had no good impact on foreign policy; rather the opposite. They have strengthened their determination that they are going to get along without the American product.

Both Democratic and Republican administrations have had to do it. There has been no change in an adversary's foreign policy, and once we realized that, we have to change our policy. This puts us in an awkward position. How do we go about deciding, once we have put sanctions on, to take them off? What decisionmaking process occurs? Is it wise for us to get ourselves in that position, if we really cannot affect their foreign policy as a result of those sanctions?

Mr. Dam. To answer the technical part of your question, the process is, of course, the same interagency process culminating in a Presidential decision that is used for the imposition of controls. That is to say, the lifting of the controls and imposition of the controls are basically the same question of foreign policy formation within the executive branch.

I agree with you. In many cases there is a tendency, which I think is justified, to use foreign policy controls as a way of expressing the strong view of the U.S. Government toward foreign activities with which we do not agree. When used in that way it is, of course, a wasted asset. It is particularly a wasted asset when our allies fail to go along with us or fall off the train very quickly.

That is one of the reasons why, in the national security area, we have emphasized the need for close work through COCOM. There is no similar organization, of course, for foreign policy controls, although we do consult closely through our NATO relationships and generally through the alliance.

There has been more consultation of that sort than has sometimes been suggested. I have reviewed the record a bit on that score, and I do believe there has been more consultation with allies than is sometimes publicly suggested.

The **Chairman.** Thank you very much indeed. Thank you, Mr. Chairman.

Senator **Mathias.** Mr. Secretary, we are dealing here with a matter of high national policy, but the question of dollars and cents is not unrelated even to matters of high national policy. We are dealing with a time when the trade deficit appears headed toward a figure twice as bad as the worst nightmare anybody ever had, perhaps as high as $70 billion.

Now, given that fact, there have to be some tradeoffs. Are our policies of denial under foreign policy controls likely to achieve either a practical or symbolic effect which is worth the cost to our economy?

Mr. Dam. I think obviously there are many cases in which foreign policy controls are effective and should be used, and there are even situations in which they have either been mandated in effect by Congress or in which we have imposed them after very extensive consultation with Congress and strong urging by Congress.

When one considers the fact that not all applications of foreign policy controls are of the kind that receive the publicity left in the wake of the pipeline question but rather are much more particularized, you can see that that is not an easy question to answer with a yes or no. It is not black or white.

For example, we have human rights controls of various kinds. We have controls on South Africa showing our abhorence of apartheid and our desire to protect innocent people in particular countries where there are human rights problems.

We had sanctions in the Iranian case which I think helped in the release of the hostages. We have controls on certain nuclear items in connection with our efforts on nonproliferation. So in those areas, for example, I think everyone would agree that the sanctions are called for and are on the whole, within the bounds of the possible, quite effective.

Then we have a number of areas where we have imposed controls on particular countries, pending some change in their behavior which would permit us to have a change in our diplomatic relationship. I refer particularly to our controls with respect to Cuba, North Korea, Vietnam, and Kampuchea.

Now and then, we get into the area of things like the post-Afghanistan sanctions. There I can see there is more room for debate as their effectiveness.

One of the reasons that we sought to put into the existing legislation a contract sanctity provision was to assure that we could get in the foreign policy area most of the benefits we seek without placing undue burdens on American business. That also was one of the reasons why we had the explicit policy provision in connection with extraterritoriality, indicating that it was our purpose to minimize the extraterritorial impact of controls wherever possible. This was to assure that foreign businesses would continue to look to the United States as suppliers of components and the like. So I think you have to examine various areas in order to discuss the effectiveness of controls. In some areas it is more controversial than in other areas.

Senator MATHIAS. I would agree with that. I think that obviously different situations have different degrees of danger, different degrees of relativity to national problems, and it is very difficult to give dogmatic answers.

I think that is true of this whole area. I would say it is true of the example that you gave of the truck assembly plant that was licensed for the Soviet Union and which ultimately may have provided some equipment used in connection with operations of the Red Army in Afghanistan.

I think one would have to ask the same sort of questions about that episode. Could assembly plants of a similar quality have been available to the U.S.S.R. from other sources, from Italy, for example, or Germany or Japan?

Mr. DAM. I agree that there are always those possibilities. It is undoubtedly the moral aspect in many cases that is quite important. Even foreign availability may be more theoretical than real in a situation like the truck case, and foreign availability really is not too much related to our human rights controls. You can talk about equipment, say, for sale to police departments in areas where there are ongoing human rights violations. I suppose it really doesn't make too much difference that those police departments can get weapons for the purpose of torture and abuse from other countries. That is not really a reason for saying the United States should supply them. So there is quite a spectrum of situations involved.

Senator MATHIAS. What economic importance do you place on this whole subject? Mr. Giffen who preceded you this morning, the senior vice president of Armco Steel, said that his company simply would not undertake any further attempts to make export sales with controlled countries that involved prolonged contract negotiations and perhaps a prolonged period of contract performance which would be subject to arbitrary cancellations.

He said he felt there should be contract sanctity both under foreign policy and on national security controls side. Without that, his company simply could not undertake, nor did he believe the Soviet Union would bother, to negotiate such contracts if they are going to be so evanescent.

Mr. **Dam**. I take it from the last thing you said that he was talking largely about contracts with the Soviet Union?

Senator **Mathias**. Yes; but I think it would apply to other countries as well.

Mr. **Dam**. Let me speak to it more generally.

Senator **Mathias**. Of course, that might change as the general foreign policy climate of the world changed.

Mr. **Dam**. I think there is a problem about contract sanctity in the national security area. If we determine, for example, that some kind of device could be useful to the Soviet nuclear effort, I think it would be very unfortunate if we were precluded by some contract sanctity provision from preventing any further deliveries or any further transfer of technology in connection with that matter simply because we wanted to protect U.S. exports.

On the foreign policy side, however, I think obviously there is a lot to be said for contract sanctity. That is one of the reasons the administration put a contract sanctity provision in its proposal.

We now have several different approaches to contract sanctity for the foreign policy area. The Senate essentially has no escape clause whatsoever and the House has particular areas in which it would permit cutting across existing contracts for specific exceptions.

In view of that situation the administration is currently reviewing its own position on contract sanctity to see whether there is some new position that we believe we can support.

Senator **Mathias**. To be fair to Mr. Giffen I should say that his proposal was that sanctity, under national security controls, would only be imposed after there was a license issued, so that there was some prior imprimatur of Government approval on the whole process.

All of this, of course, gets back to your point with which I agree so thoroughly, that this is a very complex and difficult area for Government, in which you have all kinds of balls in the air.

There are the economic questions, the foreign policy questions, the security questions, trade competition questions and many other questions. It drives you back really to a fundamental question of how serious is the problem we are trying to treat.

My recollection is that the experts, the people who think about these subjects very seriously, can only find one instance—and that happens to be the instance that you sighted in your statement, the truck assembly plant—in which a licensed sale has been of material value in strengthening the military capacity of the Soviet Union. I think perhaps there have been some microchip sales in addition to that, but this truck assembly plant is really the only licensed sale that has had any impact.

Mr. **Dam**. Even accepting that that would be just in the foreign policy area, there have been many situations in the national security area.

Senator **Mathias**. Well. I think this would be in the national security area, too. I mean, this is the only licensed sale that has had a positive affect on Soviet military strength. It does not have anything to do with clandestine transactions, nor does it have anything to do with the voluntary dissemination of information which we do on a daily basis in an open society.

Mr. Dam. I think I probably could agree with you if we could narrow the statement of what it is we are talking about, because my impression is there have been many, many situations in which transactions have resulted in diversion to the Soviet Union of important materials. If you like, I am sure Mr. Schneider could provide information either now orally or in writing later on that subject.

Those, as I have said, are situations where we are talking about COCOM types of transactions, not situations in which we impose restrictions under the foreign policy provisions of the act.

Senator Mathias. I think we are probably approaching an area of classified information. Maybe it would be better to have Mr. Schneider respond since he is going to make a classified communication to the committee under any circumstances respond to this question at that time.

But my own recollection on this is as I have stated. So under those circumstances, it does raise a question in my mind whether we are perhaps not churning up more conflict than the facts really require.

Mr. Dam. On the other hand, I think it is important to understand that the number of export licenses that have actually been refused are relatively small. We have some specifics that we could provide for the record or I could read them off to you, but perhaps in the interest of economy of time I would simply point out that they are really less than 1 percent of the total manufacturers exports from this country.

Now, of course, there is the problem that we have been discussing and that is the problem that the possibility of cutting across existing contracts may lead foreign companies in certain circumstances not to want to make long-term contracts with U.S. manufacturers. We agree that is quite serious and that is what we need to work on in the contract sanctity area.

Senator Mathias. Not to be argumentative, but if the CIA and DIA generally support the statements I have made this morning, and if you are right, and I am sure you are right, that a relatively small number of licenses have been denied, then does it not raise the question whether our controls, which have generated such serious expressions of concern from our closest friends, may be doing more damage than good?

Mr. Dam. I think it is important to maintain the control apparatus and to maintain the controls in areas like human rights, nuclear nonproliferation, and other specialized areas. I think there is a remaining area of general foreign policy concern.

The administration recognizes that there is the problem that you have indicated and that is the reason for the specific declaration that we are going to take into account the effect of controls on business in friendly allied countries. I think it would be a mistake, because there may be some negative effects of the export control process, to get rid of it without first working very hard on taking care of the kinds of cases that create the problem.

We would be very pleased to be able to work with you on the problem situations before we go to the conclusion that we need to eliminate the export control process in the foreign policy area.

Senator Mathias. I appreciate that offer and would be anxious to enter into any kind of discussion that would be helpful in this respect.

I would hope that we could ultimately find a formula that would achieve your objectives. Let me say in referring to your objectives, that I have a good deal of sympathy with your views on the import side as you have expressed them this morning.

I hope we can find a way to devise a program that is compatible with the absolute necessity of enhancing our economic competitiveness in the world. If we do not do better than we are doing in terms of trade and economic competition, we are in for real trouble. Any kind of halter that we are putting on the economy either through this legislation or any other has to be examined very carefully in that light.

If you take Mr. Giffen seriously in his testimony this morning—and I do take him seriously—these controls would be a major stumbling block to expanded international competition by the United States.

Mr. DAM. We do take seriously the necessity for promoting U.S. exports and avoiding unnecessary limitation on them. There is no question about the great importance not just to individual enterprises and to individual workers but also to the economic and thereby the national security strength of the United States.

Senator MATHIAS. I have here several questions that have been propounded by Senator Boschwitz. If you will be kind enough to respond to them for the record, we will submit them to you in writing.

Mr. DAM. Yes, indeed.

Senator MATHIAS. The record is to be kept open for 1 week. There may be other members of the committee who will have some questions to which if you will be kind enough to provide answers, they will be included in the record. Of course, if you have any further thoughts of your own, we would be happy to have them.

Mr. DAM. Thank you very much. We would be pleased to answer any questions that you may submit to us.

Senator MATHIAS. Fine. If there is no further business then the committee stands adjourned.

[Additional questions and answers follow:]

MR. GIFFEN'S RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED BY SENATOR MATHIAS

Question 1. From a business perspective, do you believe that U.S. foreign policy controls have been effective in influencing Soviet behavior or that they can be made more effective? Are there circumstances in which we can realistically expect to strengthen their effect by getting more international cooperation?

Answer. From a business perspective, U.S. foreign policy controls have not been effective in influencing Soviet behavior. In order to be effective in accomplishing such a purpose, the United States must have leverage. No trade sanction, no embargo, no act of economic warfare has ever worked when the country applying the embargo did not have leverage. A country can only have leverage with respect to a second country when that second country has either an absolute need or the perception of an absolute need for a particular technology or product and no other source from which to obtain it except the country applying the embargo.

Quite frankly, it is difficult to think of any technology or product which the Soviets need and which is fundamental to the survival of their country and which is not available to the Soviets either internally or from U.S. trading partners that do not join in such sanctions. If that is the case, many of us find it difficult to believe that trade sanctions can ever logically be utilized to coerce the Soviets into taking a particular action. Quite the contrary, it may well stiffen the resolve of the Soviets to do just the opposite.

For example, after the Afghanistan sanctions were put in place in January of 1980 Armco lost potentially over $9 billion in transactions to our Western trading partners and the Soviets have recently identified at least 10 other projects that could have gone to American companies if it were not for the sanctions. See Exhibit I.

In short, foreign policy controls can only be made more effective if the United States can prevent the Soviets from obtaining needed products or technology. The only realistic area in which the United States can hope to strengthen the effect of foreign policy controls would be in those areas where the United States held a monopoly in the technology or products.

Question 2. Is a policy of denial likely to encourage the U.S.S.R. to change policies which would trigger foreign policy controls or to shift resources from military to civilian uses, in your judgment?

Answer. In my judgment, very few negative or coercive policies of the United States can be effective in forcing the Soviets to change their policies or to shift their resources from military to civilian purposes. A policy of denial merely stiffens the resolve of the Soviets.

Question 3. There seem to be many ways by which national security controls can be evaded. The new Senate bill appears to approach that problem by expending the review authority of the Secretary of Defense and by expanding the penalties and extraterritorial reach of U.S. laws. Is this the direction to go for a practical solution to the diversion problems?

Answer. Expanding the review authority of the Secretary of Defense as well as the penalties and extraterritorial reach of U.S. laws is not a practical solution to the problem of diversion of technology which would allow for national security controls to be invaded.

The extraterritorial issue has been examined, re-examined and over-examined The results are clear. The United States must not impinge upon the sovereignty of other countries.

Furthermore, it is one thing to expand penalties; it is something very different to enforce the penalties even if the violations which give rise to them are known. The real problem is that the Executive Branch cannot see the forest for the trees. Our national security control provisions must set forth standards which will allow the Department of Commerce to focus on technology exports which would clearly be detrimental to the national security of the United States.

Question 4. How serious would you estimate the damage is to U.S. business from procedural delays and license rejections in terms of sales lost and reduction in market share? Does a significant part of the cost involve exports that are needlessly lost through license requirements on products that need not be controlled or that are readily available from foreign sources?

Answer. Damage to U.S. business from procedural delays and license rejections in the Soviet market is significant and much of that involves exports which are needlessly lost through license requirements on products that need not be controlled. For example, Armco received an inquiry for a purchase of a substantial quantity of oilfield country tubular goods in November of 1982. Armco did not receive approval for the licenses until March of 1983. By that time the contracts were filled by our Western trading partners in Japan, Italy, France, Great Britain, and West Germany. In fact, almost evey industrial country in the world manufactures oilfield country tubular products for the Soviet Union.

Question 5. How high would you rank the importance of making improvements in procedures for determining the extent of foreign availability of controlled exports? Would this be an area of high payoff for those seeking to reduce the business costs of administering export controls? If not, what improvements would offer a higher payoff?

Answer. The most important improvements in the Export Administration Act would be:

(*A*) *Sanctity of contract provisions.*—Contracts executed once export licenses have been granted and the licenses should not be capable of suspension or revocation. The Soviets have made it absolutely clear that the Soviet Union recognizes the sovereign right of the United States to determine which exports it wishes to allow to the Soviet Union and which exports it will not allow. The Soviets do not necessarily agree with the United States national security control definitions, and while they totally disagree with the foreign policy provisions of the act, they do not question the right of the United States to have such controls.

They do insist, however, that if the United States wishes to continue a trading relationship with the Soviet Union, executed contracts operating under approved licenses must not be breached. In short, the United States should keep its word. Furthermore, American businessmen will not be interested in exploring an expansion of trade between the two countries unless there is a meaningful "sanctity of contract" provision in the Act. This should not be objectionable to the administration since President Reagan himself has stated that "there must be no question about our respect for contracts. We must restore confidence in the United States' reliability as a supplier."

Any sanctity of contract provision in the act must apply to both national security controls and foreign policy controls. If a sanctity of contract provision only applies to foreign policy controls, it will not be very helpful. Since there are not adequate standards or guidelines for the application of national security controls, the executive branch can effectively circumvent the sanctity of contract provisions merely by suspending licenses on the basis of national security.

Therefore, without an adequate and meaningful sanctity of contract provision, neither the Soviet Union nor the American business community will be willing to enter into attempts to expand the trading relationship in anything but short-term, commodity transactions.

No other provision of the Act is more important!

(*B*) *National security control standards.*—What is missing from the current legislation are standards or guidelines that the executive branch of the government can utilize in making the determination as to what is "militarily significant."

The guidelines or standards should include consideration of whether:

There is a reasonable likelihood that the technology or product to be exported would actually be used more for military purposes than for civilian purposes;

The particular technology or product would make a substantial contribution to the military potential of the Soviet Union; and

The Soviet Union could obtain the same technology or products from another source or produce it themselves in some significant time frame and at some comparable cost.

Without Congressional direction, some might argue that export controls should be utilized to prevent not only exports which significantly contribute to the military potential of the Soviet Union but also exports which contribute indirectly to the military potential through the strengthening of the Soviet economy. This argument is based upon the proposition that the military potential of the Soviet Union rests upon the technological base of the economy and that, therefore, no export should be allowed which contributes to the Soviet economy. Any export theoretically helps an importing country's economy. Such a standard, if adopted, would simply be no standard, and the executive branch would be free to utilize absolute discretion in determining what exports should be controlled and when. That is not, nor should it be, the intention or the purpose of the national security controls of the Act.

Furthermore, if the United States is to restrict exports to the Soviet Union in order to prevent a contribution to its military potential, the United States should not act unilaterally. The United States should negotiate with its allies in an attempt to enter into a coordinated effort to prevent the export of militarily significant goods and technologies to the Soviet Union. Export controls on technologies or products which are freely available to the Soviet Union from Western Europe or Japan are neither productive nor effective from a national security standpoint. Therefore, such controls should be eliminated if there has been determination of foreign availability.

Question 6. Infringements on reliability of U.S. supply, sanctity of contracts, and extraterritoriality are all said to be indirect factors that have reduced U.S. competition in the world market as a result of actions related to the Soviet market. Is there evidence that some European companies are excluding U.S. companies from participating in contracts to supply the U.S.S.R. and Eastern European countries?

Answer. European countries are excluding U.S. companies from participating in contracts to supply the Soviet Union and the countries of Eastern Europe because U.S. companies cannot guarantee performance. Armco's machinery and equipment has been rejected on several occasions by European contractors on grounds that we could not guarantee that our export licenses would not be suspended or revoked.

Question 7. Can expanded national security controls be made compatible with efforts to enhance U.S. exports competitiveness and to eliminate "unnecessary" U.S. Government regulation?

Answer. See answer to 5 above.

EXHIBIT I

U.S.S.R. Projects

Type of Product	USSR.Location	Type of Tech/ Products	Est Value	Contract Signed	Country of American Competitor
A. Armco Projects					
1. Dynamo Steel Facility	Novolipetsk	Steel manufacturing technology & equipment	$350M	Summer 1980	France
2. Natural Gas production & processing	Astrakhan	Technical documentation and equipment for natural gas production & processing	$500M	December 1982	France Germany
3. Exploration and development of oil reserves	Barents Sea	Technology and equipment	$8B	-	Norway England France Italy W. Germany
4. Tertiary recovery of oil from existing wells	Pre Caspian Depression	Technology and equipment	$300M	-	England France W. Germany

TOTAL ARMCO PROJECTS $9.15 BILLION

Type of Product	USSR Location	Type of Tech/ Products	Est. Value	Contract Signed	Country of American Competitor
B. Other Projects					
1. Oil production equipment	Tenghiz	Technology for production and primary processing.	$400M	1983	France Germany Italy
2. Electronic telephone facility	Voronezh Ufa	Manufacturing technology and equipment	$130M	1981	France
3. Bulldozers, pipelayers and automatic dumps	-	Bulldozers, pipelayers and automatic dumps 120MT/freight	$800M	1980-2	Japan Italy
4. Gas lift equipment	Tataria	Gas lift equipment for oil production	$250M	1978	France Germany
5. Sakhalin Project	Sakhalin Island	Equipment for oil and gas exploration and production	$250M	1978-79	Japan
6. Gas pipeline	Urengoi-Uzhgorod	 Automated Control System	$1.75B $200M	- -	France Germany
7. Second line for Kamaz	Kama River	Insulation and other equipment	$350M	-	France Germany Italy
8. 5 plants to produce 1 million tons (each) Per yr. of methanol from natural gas	West Siberia	Technology and equipment	$2B	-	England France Japan W. Germany
9. Aluminum Manufacturing Facility	-	Technology and equipment	$300M	1980-81	France W. Germany
TOTAL OTHER PROJECTS	$6.43 BILLION				

MR. MENDELOWITZ' RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED BY SENATOR MATHIAS

Question 1. Your testimony cites improving Commerce Department foreign availability assessment and prohibiting use of controls where foreign availability exists as a way of reducing economic costs of foreign policy controls by reducing the extent of their use. Would you judge also that foreign availability undercuts the value of such controls? Would prohibiting control use where foreign availability exists not reduce greatly the cost of the controls and assure greater effectiveness of what controls were applied at the same time?

Answer. Foreign policy export controls have been imposed for declarative purposes, as well as for punitive or remedial reasons. In some recent uses of foreign policy controls, there is no expectation that controls by themselves will alter the target country's policies or actions by depriving it of certain goods; rather, their value is seen primarily as publicly disassociating the United States from such countries. In these cases, foreign availability considerations are practically irrelevant.

Where controls are imposed for remedial or punitive purposes, foreign availability should be a crucial consideration, and multilateral rather than unilateral action will determine whether controls are effective in achieving their purposes. In these cases, prohibiting control use where foreign availability exists is likely to reduce the cost of controls and assure greater effectiveness.

Question 2. Does it strike you as cost-effective to apply such a prohibition and to invest in improved assessment of foreign availability, which would also appear necessary to improve the effectiveness of national security controls?

Answer. The Commerce Department has had a mandate to improve its foreign availability assessment capability for several years now, but has not been able to establish a comprehensive assessment capability. Where foreign policy controls are imposed on a comprehensive basis, as they were for example in Libya in March 1982, they can cover an enormous range of products. For Commerce to keep track of such a broad scope of products as well as keep up-to-date on continuing technological developments would probably require a very substantial resource outlay. Commerce and State Department representatives overseas would have to spend a great deal of time collecting information on the activities and technological developments of our trading partners' private firms, and this could be resented as commercial intelligence-gathering. And where the purpose of the controls is declarative, foreign availability is not viewed as very relevant in any case.

One alternative is to rely on U.S. exporter assurances of foreign availability, with U.S. verification concentrated in the most sensitive goods and technology sectors.

MR. MARCUSS' RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED BY SENATOR MATHIAS

Question 1. Is a contract sanctity provision a useful and desirable modification for the Congress to make in the foreign policy control authority? Should such a sanctity provision be absolute, as now proposed in the Senate bill, or should it be subject to some expectations? What expectations if any would be appropriate?

Answer. Economic theory, economic reality and fundamental fairness suggest that it is desirable to provide exporters with some protection for their existing contracts. There seems to be little disagreement that something must be done to protect existing contracts. There is great disagreement, however, on how this should be accomplished.

I believe that current proposals are either inappropriate or likely to be ineffective. An absolute barrier to foreign policy controls that invalidate existing contracts would remove a foreign policy tool from the President's arsenal that might prove necessary under circumstances that are now not foreseen. On the other hand, a broadly worded escape provision is likely to provide little realistic protection. As I proposed in my testimony, a provision to provide compensation for terminated contracts should be considered as an alternative. Such a provision would give pause to anyone contemplating imposition of controls that affect existing contracts but still leave the President's foreign policy options open while dealing more fairly with exporters' legitimate concerns.

Question 2. Do the extraterritorial provisions of current law provide an effective means for improving the impact of either foreign policy or national security controls?

Answer. Generally speaking, no. By and large they constitute such an irritant in our relations with our allies, as evidenced by the Soviet pipeline sanctions, that they seriously undermine our objectives. As indicated in my testimony, there are few, if any, circumstances where controls applied to the U.S. parent of a foreign subsidiary could not accomplish the same result as controls applied extraterritorially to the subsidiary.[1]

Question 3. Should national security controls be made subject to congressional oversight because of their potential impact on the conduct of U.S. economic and foreign policy?

Answer. National security controls can affect significantly the American economy and U.S. foreign policy. Congress should, therefore, exercise vigorous oversight. It should not, however, be involved in individual licensing decisions. It should limit itself to defining with precision situations that justify national security controls and then exercise its oversight role to insure that the law is faithfully carried out. By doing so, Congress could deter the executive branch from labeling what is really a foreign policy-based control as a national security control to escape the procedural and substantive requirements that apply to foreign policy controls.

Question 4. The Senate bill contains a provision requiring the President to determine that extraterritorial controls not have effects adverse to U.S. foreign policy interests. Can such a provision be meaningful and effective in protecting against adverse consequences? Would the House bill approach of prohibiting extraterritorial controls be more desirable? Is there some technique between these two approaches that might be more appropriate?

Answer. As indicated above. there is much to be said for prohibiting extraterritorial foreign policy controls altogether on the ground that they are unneeded and can do more harm than good. The current limitations in the Senate bill are subject to the vagaries of executive interpretation and, therefore, constitute no limitation at all. A middle ground between prohibiting extraterritorial application of export controls and merely counseling against their extraterritorial application would be to require the President to consider certain factors before imposing extraterritorial controls and to report upon these factors to Congress or a congressional committee. To be effective, however, such a provision should be made enforceable through the opportunity for injunctive relief modeled after the relief available when the executive branch fails to follow proper procedures in carrying out environmental impact studies.

[Whereupon, at 12:20 p.m., the subcommittee adjourned, subject to call of the Chair.]

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[1] *See* Note, "Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law," 81 Mich. L. Rev. 1308, 1315–31 (1983). See also, Marcuss and Richard, "Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory," 20 Colum. J. Transnat'l L. 439 (1981).

APPENDIX

Department of State,
Washington, D.C., May 16, 1983.

Hon. **Charles H. Percy**,
Chairman, Committee on Foreign Relations,
U.S. Senate.

Dear Mr. Chairman: At the request of the Embassy of Canada, we are transmitting herewith, for your information, a copy of a note concerning the Export Administration Act delivered to the Department of State on Wednesday, May 4.

Our transmittal of this note does not imply acceptance of the views contained therein.

Sincerely,

Powell A. Moore,
Assistant Secretary for Congressional Relations.

Enclosure:

Canadian Embassy, Note No. 169

The Embassy of Canada presents its compliments to the Department of State and has the honour to refer to the review of the Export Administration Act of 1979 (the "Act"), which will expire on September 30, 1983. Canada has serious concerns with respect to certain aspects of U.S. export control law and policy that affect Canadian interests. The following comments, which bear upon the assertions of jurisdiction that underlie some aspects of the Act, are provided for consideration during the Congressional Review. The Government of Canada urges that the concerns reflected in these comments be accommodation in amendments to the Act and its regulations.

The Government of Canada and the Government of the United States of America have long cooperated with respect to export controls, following upon the 1941 Hyde Park Agreement. This is manifest in the treatment that is accorded each country in the administration of the export control laws of the other. Generally speaking, pursuant to the Hyde Park Agreement, U.S. goods are exported to Canada without U.S. export licenses, and vice-versa. To prevent the circumvention of U.S. controls, Canada regulates the re-export of controlled U.S.-origin goods. This system has benefited both countries. It has helped to maintain bilateral trade flows free of the impediment of export licenses, while still safeguarding mutual security objectives..

The Department will recall, however, the Embassy's note no. 48 of January 27, 1978 regarding the transfer to the Act of authority to exercise "control over exports of non-U.S.-origin goods and technology by foreign subsidiaries of U.S. concerns". At that time the Government of Canada stated its view that "U.S. authorities are not entitled to exercise jurisdiction over Canadian companies solely on the basis that these companies may be '"controlled" by U.S. citizens, nor to exercise jurisdiction with respect to business activities of such Canadian companies carried on outside the United States". The Department will also recall the Embassy's note no. 323 of July 7, 1982 following the exercise of controls over subsidiaries in respect of the sale of oil and gas equipment and technology to the USSR. On that occasion, the Government of Canada expressed its "strong view that the jurisdiction that the United States seeks to assert over Canadian corporations . . . would constitute an unacceptable intrusion of U.S. law into Canadian commerce and Canadian external relations".

International law provides no basis for the United States to assert jurisdiction over the activities of Canadian corporations simply because such corporations, in some measure, may be owned or controlled by U.S. nationals. Corporations that are nationals of Canada, producing goods and services in Canada, are subject only to the laws and policies of Canada in respect of the export of such Canadian goods and services to third countries. Any attempt by a foreign agency to interfere with this jurisdiction of the Canadian government over such conduct in Canada is a violation of Canadian sovereignty.

Assertions of jurisdiction that displace a government's authority over multinational enterprises operating in its territory hamper the ability of such enterprises to be responsible corporate citizens, contrary to the OECD guidelines for multinational enterprises. As a consequence, host countries are likely to question the entitlement of multinational enterprises to national treatment. Host countries may be obliged to adopt defensive legislation to restrict the impact of unlateral assertions of extraterritorial jurisdiction over such enterprises.

Canada therefore strongly urges that any revised Act not assert jurisdiction over the operations of corporations established in Canada and carrying on business under its laws.

The Government of Canada firmly believes that consultation and cooperation, not the unilateral extraterritorial extension of domestic law, are required to secure public interests that are perceived to be affected by conduct permitted by the law and policy of the country where it occurs. In this regard, the provision of the Bill presented recently to Congress by the Administration which proposes to "minimize" the extraterritorial impact of U.S. export controls "to the extent consistent with the underlying purpose of the controls", far from being reassuring, clearly implies that, in cases of conflict, the legislation is intended to override principles of international law governing the assumption of extraterritorial jurisdiction.

The institutionalized cooperation that flows from agreements within COCOM is a significant example of how governments may define and secure common security objectives. Even governments that share common security concerns, however, will not necessarily have identical foreign or trade policies. When differences exist, no government should attempt unilaterally to displace the laws and policies of another government with respect to trade from the latter's territory. In this regard, Canada cannot accept that the general imposition, through domestic public law, of so-called "submission clauses" in private commercial contracts or licensing agreements is an appropriate means to extend national exports policies to goods located abroad. Private contracting parties cannot displace the jurisdiction of governments. Attempts to displace national laws and policies are particularly objectionable when they have the effect of changing licensing rules, retroactively, in a way that frustrates legal rights and obligations of the parties concerned.

The Government of Canada finds it particularly regrettable that the Administration is seeking authority that would permit the President to impose import controls upon foreign firms failing to comply with U.S. directives under Section 5 of the Act (National Security Controls). The provision would, if brought into force, create a potential barrier to trade, with implications for U.S. international trade obligations. Moreover, it should be noted that such sanctions would apply to breaches of U.S. export controls beyond those agreed multilaterally in COCOM. The parties to COCOM are themselves responsible for implementing multilaterally-agreed controls and imposing domestic penalties in the event of infractions of their national export control laws.

Canada will continue to work with the United States and other countries to achieve an effective multilateral system to safeguard collective security interests. The Government of Canada believes that extraterritorial problems and conflicts of jurisdiction would be greatly limited if the United States would take due account of the principle of reciprocity and assert unilaterally its jurisdiction over conduct outside its territory only in circumstances where it would be prepared to recognize and accept, in similiar circumstances and on the same basis, the same unilateral assertion of jurisdiction by another state over conduct within the United States territory.

The Embassy wishes to assure the Department of Canada's continuing readiness to consult and cooperate closely with the United States on all matters relating to the review of the Act.

The Embassy would be grateful if the Department would provide a copy of this note to the Committees of the Congress having the Act currently under review.

The Embassy of Canada avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

DELEGATION OF THE COMMISSION
OF THE EUROPEAN COMMUNITIES,
Washington, D.C., March 21, 1983.

Hon. CHARLES H. PERCY,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The European Community will on Wednesday, March 23 present to the U.S. Administration an Aide-Memoire concerning the renewal of the Export Administration Act of 1979.

In its Aide-Memoire, a copy of which I enclose, the European Community expresses grave concern about the way the existing Export Administration Act affects companies doing business in the Community and in particular about the claim, implicit both in the Act itself and the way in which it has been interpreted by the U.S. Administration, that U.S. jurisdiction extends to persons doing business in the Community.

In our opinion, the extraterritorial aspects of U.S. law and practice in the export control field are contrary to international law. They also pose serious political and economic problems.

The problems arising from the application of the Export Administration Act are compounded by the fact that the President may introduce export controls for the furtherance of U.S. foreign policy goals which are not shared, or at least not shared to the same extent, by the European Community. The pipeline sanctions were a most unfortunate example of the U.S. seeking to extend its jurisdiction to companies doing business in the Community.

The problems caused by the extraterritorial application of U.S. export controls have been aggravated by the fact that such controls have been applied at times retroactively long after contracts have been concluded in good faith.

I know that the business community in the United States is as preoccupied as we are about the problems caused by the extraterritorial and retroactive application of U.S. export controls.

The European Community believes that the correct course to follow in cases where the U.S. Government considers it necessary for controls to be applied outside its territory for reasons of national security or foreign policy is to seek a consensus with its trading partners on the trade controls to be adopted and not to try to extend controls unilaterally to Community companies.

I would be very pleased to meet with you and your staff to discuss any questions you may have about the Community's views on this issue.

Yours sincerely,

ROY DENMAN.

AIDE-MEMOIRE No. 1

The European Community and its Member States have the honour to present to the U.S. Administration the following Aide-Memoire concerning the Export Administration Act of 1979.

1. The considerations set out below pertain to the way this Act affects companies doing business in the Community and in particular to the claims, implicit both in the Act itself and in the way it has been interpreted by the U.S. Administration, that U.S. jurisdiction under the Act extends to persons doing business in the Community.

2. The Export Administration Act contains such phrases as "any person subject to the jurisdiction of the United States" which has consistently been defined so as to include companies incorporated, having their registered office or doing business in foreign countries and owned or controlled by U.S. natural or legal persons. Moreover, the Act itself defines a 'U.S. person' so that those words include foreign subsidiaries or affiliates of U.S. domestic concerns which are 'controlled in fact' by those concerns. As regards the Administration's interpretation of the Act, this has consistently been such as to include within 'goods', technology or other information subject to the jurisdiction of the United States" such goods and technology which have already left the United States. As well as being contrary to international law such assertions of jurisdiction by the U.S. Congress and Administration are bound to lead to conflict at the political and legal level. The problems arising from the application of the Export Administration Act are compounded by the fact that section 6 of the Act enables the President to impose export controls for reasons of foreign policy adopted by the United States, but not necessarily shared, or shared to the same extent, by

friendly countries. Finally, the problem is exacerbated where, as in a recent case, the U.S. Administration have seen fit to apply restrictions with retroactive effect to the re-export, under contracts already lawfully entered into, of goods and technology which had already left the United States.

3. These aspects of the Export Administration Act and its application have given rise to considerable concern in the European Community. In this connection its comments on the amendments of June 22, 1982 to the U.S. Export Administration regulations which were transmitted to the Department of State on August 12, 1982 are recalled. The renewal of the Export Administration Act provides the opportunity to bring the following points to the attention of the U.S. Administration in order to stress the deeply felt concern about these matters once again.

4. According to a basic principle of international law, any natural or legal person doing business in the Community should abide both by Community and national legislation in force therein. The legal and regulatory definitions of the terms "any person subject to the jurisdiction of the United States" and "U.S. person", which include companies incorporated, having their registered office, and/or doing business in foreign countries, because they are owned or controlled by U.S. natural or legal persons, run counter to this principle.

As already shown in the aforementioned comments on August 12, 1982 the claim to regard as having U.S. nationality companies incorporated and having their registered office in Member States of the Community is not in conformity with recognized principles of international law.[1]

It is unacceptable that the U.S. Administration and Congress should assert jurisdiction over the activities of these companies in the Community.

5. Moreover, such assertions of jurisdiction, which imply that overseas subsidiaries and associates of U.S. companies owe allegiance to U.S. law and policy, cannot be reconciled with proposals by the U.S. Administration in various international fora for the "national treatment" of investment from abroad and they create a climate less favourable to U.S. investment.

6. According to a basic rule of private international law as generally applied, goods are subject to the law of the place where they are located.

However, the words "any goods, technology or other information subject to the jurisdiction of the United States" though not defined in the Export Administration Act, have been interpreted by the Administration so as to mean that U.S. jurisdiction follows these goods, technology or other information even after they have left U.S. territory.

7. In the comments of August 12, 1982 it was stressed that there are no known rules of international law for using the domestic origin of goods or technology situated abroad as a basis for establishing jurisdiction over persons abroad which control those goods or technology.

8. Several decisions by respected non-U.S. Courts[2] confirm the principle that U.S. jurisdiction may not follow goods originating in the U.S., once they have been discharged in the territory of another country.

9. This extension of U.S. export controls to the trade between Third Countries in goods, which are claimed to be subject to U.S. jurisdiction, is also objectionable for commercial and political reasons. Many industries in the Community have quite readily accepted U.S. know-how and advanced products in the past and have to a certain extent become dependent upon them for their own production. If it turns out that they may become subject to U.S. export restrictions at any moment, they might feel constrained to change their policy and either seek technology or advanced products elsewhere, developing them themselves, or developing them in joint ventures with non-U.S. companies. It is inconsistent for the U.S. Government, which has always been a strong proponent of the free exchange of technology and know-how, at the same time to subject the use of this technology to such hazards.

10. The U.S. regulatory practice under the Export Administration Act of imposing export controls retroactively has the effect of exposing companies incorporated in the Community and/or handling certain U.S. origin goods to sanctions long after contracts have been concluded in good faith and in full conformity with all U.S. laws and regulations in force at the time.

11. This has serious consequences for international commercial relations. It introduces an element of uncertainty against which it is virtually impossible to

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[1] Barcelona Traction case. ICJ Report 1970. 3. 43.

[2] *American Presidential Lines* v. *China Mutual Trading Co.*, 1953 A.M.C. 1510, 1526 (Hong Kong Sup. Ct) and *Moens* v. *Ahlers North German Lloyd*, 30 R.W. 360 (Tribunal of Commerce, Antwerp (1966)).

take effective precautions and must breed reluctance to deal with companies of the country using this method of regulating trade.

12. It has been argued in the past by U.S. authorities that the practices sub 6 and 10 are not objectionable where foreign companies have agreed either in a contract clause or in an undertaking to the U.S. Government to respect U.S. export control legislation. However, such "Submission Clauses" cannot confer on the U.S. export controls a valid jurisdictional reach which they would not otherwise have.

It is also particularly objectionable for a government systematically to encourage or require companies to include such "Submission Clauses" in their contracts with foreign clients. This is a clear abuse, for foreign policy purposes, of the freedom of contract.

13. All the above-mentioned problems are compounded by the fact that export controls can be introduced unilaterally by the U.S. Administration for the furtherance of U.S. foreign policy goals which are not necessarily shared even by friendly countries which have close political and economic ties with the U.S.

14. Unlike national security and short supply controls, foreign policy controls are not covered by any of the exemptions in Articles XX or XXI of the GATT. Therefore, in respect of any measures taken under the Export Administration Act for foreign policy reasons, which have the effect of limiting Community trade, the position and rights under the GATT are strictly reserved.

15. It is not justifiable nor acceptable that Section 6 of the Export Administration Act be used to impose U.S. law and policy on other friendly countries which will have their own policy views and will wish to take their own decisions on what restrictions, if any, can be imposed on trade with Third Countries.

16. The correct course to follow in cases where the U.S. Government considers it necessary for controls to be applied outside its territory for reasons of national security or foreign policy, is to seek a consensus with its trading partners on the trade controls to be adopted and not to try to extend controls unilaterally to Community companies through the objectionable legal techniques discussed.

17. If the unacceptable practices referred to above continue, it may be necessary to consider means by which the effects on persons doing business in the Community of the extraterritorial application of U.S. export controls might be countered.

18. *Conclusions.—*

The extraterritorial aspects of U.S. law and practice in the export control field are contrary to international law and it is in the interest of both parties that disputes over U.S. export controls should be avoided in the future. As we have seen on the occasion of the pipeline dispute, considerable political disruption and commercial damage can ensue. Such disputes should be avoided and the U.S. Administration is, therefore, urged to take such measures as are necessary to secure the amendment of the Export Administration Act at least in the following respects:

(1) The terms of the Act should make it clear:

That companies incorporated and having their registered offices in the Community are not to be regarded as being within U.S. jurisdiction by reason of the fact that they are owned or "controlled in fact" by U.S. citizens or companies incorporated in the U.S.

That the words "any goods, technology or other information within the jurisdiction of the United States" must be interpreted as excluding any goods, technology or other information located outside the United States regardless of its origin.

(2) The authority to impose controls for the furtherance of U.S. foreign policy should be reconsidered and if this power is retained it should be limited so that controls cannot affect companies incorporated and having their registered office in the Community.

With respect to the administrative practice followed under the Export Administration Act, it is strongly urged that the U.S. Administration modifies the text of the new Export Administration Bill along the above-mentioned lines.

AIDE-MEMOIRE NO. 2

1. The European Community and its Member States wish to refer to the recent proposal of the U.S. Government concerning the renewal of the Export Administration Act of 1979.

2. The European Community and its Member States wish to express their regret that the proposal has left the extraterritorial aspects of that Act largely intact and would appear indeed to have reinforced their impact in at least one respect.

3. While it is true that there is a new provision in Section 3 ("Declaration of policy") stating that it is the policy of the United States to minimise the impact of new foreign policy controls on business activities in allied or friendly countries, this policy statement is not matched by any amendments to those provisions in the operative sections of the Act which give rise to the possibility of extraterritorial application. Further, it leaves intact the possibility of taking extraterritorial measures for foreign policy reasons where this would be consistent with the underlying purpose of the controls. This statement also fails to address the question of extraterritorial application of controls where the controls are exercised for national security or short supply purposes.

4. The European Community and its Member States draw attention in this connection to the following defects in the draft bill:

(a) the inclusion in Sections 5, 6 and 7 of the term "Person subject to the jurisdiction of the United States" without any definition to clarify that the words do not include the overseas subsidiaries or affiliates of U.S. parent companies;

(b) the inclusion in Sections 5, 6 and 7 of some or all of the words "goods, technology or other information subject to the jurisdiction of the United States" without any definition to clarify that the words do not include goods, technology or information located outside the United States;

(c) the retention in the definition of the term "United States person" in Section 16 of the words "and any foreign subsidiary or affiliate including any permanent foreign establishment of any domestic concern which is controlled in fact by such domestic concerns."

5. Furthermore, the possibility given to the President (in Section 11(c)(3) to prescribe controls on imports of goods or technology of "whoever violates any national security controls" imposed under the national security provision (Section 5) of the Act, must, by its very nature apply mainly to companies outside U.S. jurisdiction, and can thus only have the effect of increasing or reinforcing the extraterritorial use that is likely to be made of national security controls.

6. The European Community and its Member States also wish to point out that the use of import restrictions in this manner could be contrary to the GATT. Article XXI of GATT does not permit such extensive interpretation of national security as to permit controls to the extent envisaged in Section 11(c)(3).

7. Furthermore, the proposal strengthens the enforcement section and penal sanctions in a way which will affect acts taking place outside U.S. territory and could undermine the climate of confidence indispensable to trade.

8. Finally, the European Community and its Member States would like to express their appreciation of the inclusion in the U.S. Government proposal of a contract sanctity clause (end of Section 6). They are concerned, however, with the limitations imposed in this clause.

9. It is necessary to restrict transfer of goods under this clause to a period of 270 days? This time limitation may be appropriate when speaking of perishable goods (as in the Agricultural Futures Trading Act of 1982) but would seem inappropriate and of very limited application for contracts involving industrial goods which can require a longer delivery schedule before even the first transfer of goods takes place under the contract.

10. Furthermore, the sanctity clause only applies to transfer of goods or technology under sales contracts. This appears unnecessarily restrictive given that controls may also exist, and goods be transferred, under other types of contract, e.g., licenses contracts, lease with option to purchase, etc.

11. Again, the sanctity clause only applies in the case of foreign policy and not in the case of national security or short supply controls. Different economic or strategic considerations obviously apply in each case, but in the opinion of the European Community and its Member States these considerations are not sufficient to warrant application of the principle in one and not in the others.

12. Finally, the principle established is not absolute, is only a policy statement, and will only be exercised to the extent consistent with the underlying purpose of the controls. This fails to create the certainty in commercial dealings which would normally be achieved through a contract sanctity clause.

13. In conclusion, the Community and its Member States wish to reiterate their deep concern with the features of the Administration's proposal discussed above and in particular with its extraterritorial and retroactive reach. They therefore urge the Administration to reconsider these aspects which are contrary to international law and comity and are unacceptable in the context of relations with friendly countries.

STATEMENT OF W. F. NICHOLAS, DIRECTOR, LONDON CHAMBER OF COMMERCE ON REAUTHORIZATION OF THE EXPORT ADMINISTRATION ACT[1]

Mr. Chairman, I am W. F. Nicholas, Director of the London Chamber of Commerce and Industry (LCCI) of the United Kingdom. The LCCI represents over 7,000 British business enterprises, trade, and professional organizations and is associated with nearly 100 other Chambers of Commerce in the United Kingdom having over 50,000 members.

I am pleased to have this opportunity to submit this statement on behalf of the LCCI on the reauthorization of the Export Administration Act (EAA). The LCCI has requested an opportunity to submit this statement essentially because we felt it was vitally important to remind our friends in the United States Congress that the EAA affects America's trade relations not only with the Soviet Bloc but also with its trading partners, including the United Kingdom.

At the outset of my remarks, I wish to emphasize that the decisions which Congress will take with respect to amending the EAA will have considerable impact on U.K.–U.S. trade relations. As the American business community knows all too well, the authority granted the President under the EAA can cause major disruptions in the political and commercial relations between our two nations.

For example, under the EAA's foreign policy export control provisions, a U.S. President can invoke trade sanctions against a Soviet Bloc nation, and can insist that foreign subsidiaries, affiliates or licensees of United States companies located wholly outside the United States comply with these sanctions.

Moreover, wholly non-United States companies which transship United States origin commodities or technical data may also be subject to U.S. law.

U.K. businesses were especially affected by the recent United States embargo against equipment for the Soviet natural gas pipeline imposed by President Reagan in protest to the imposition of martial law in Poland. The embargo affected not only British industry, but also German, French, Italian and other companies as well. The embargo was later repealed in large measure because of the vocal protest and intervention of British and other European Governments, directing business interests in their countries to proceed to fulfill contracts which had already been signed. However, even the order of the British Government to a wholly British company did not insulate British companies from possible sanctions under the EAA.

We in the U.K. are therefore obviously more than mere innocent bystanders in the unfolding reauthorization debate. As Congress continues its deliberations, we are vitally concerned with the many proposals to amend the EAA, and with the ultimate legislation which will be sent to your President's desk for signature.

NATIONAL SECURITY AND COCOM

Let me make clear, Mr. Chairman, that the LCCI shares America's interest in preserving and strengthening export controls to enhance the national security of the United States. The illegal diversion of militarily critical technologies to America's adversaries serves to weaken the United States and those who benefit from America's world leadership. As a member of NATO and the multilateral export control organization known as COCOM, Britain believes that strong enforcement of appropriate United States export controls is also in its overall interest. But I must emphasize the word "appropriate": In certain respects, the LCCI believes that unilateral export controls are not appropriate.

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[1] This material is circulated by W. F. Nicholas, 69 Cannon Street, London, E C4 England (Great Britain), who is registered under the Foreign Agents Registration Act with the Department of Justice, Washington, D.C., as the Executive Director and agent for the London Chamber of Commerce and Industry, 69 Cannon Street, London, E C4 England. Copies of this material are filed with the U.S. Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the content of this material by the United States Government.

INTRA-COCOM TRADE

The LCCI supports amendments to the EAA to eliminate export control regulations imposed on intra-COCOM trade. During the past year, nearly one-third of all export license applications were made by those U.S. companies exporting to COCOM nations. Since the U.S. already has the authority to exercise control over the reexport of items on COCOM's International Control List, the imposition of export controls on such items is therefore redundant, costly and unnecessary.

As a corollary to our support for legislation which would exempt items exported to COCOM nations for licensing requirements, the LCCI vigorously supports both Congressional and Administration efforts to increase the effectiveness and enforcement of the multilateral export controls administered by COCOM. We believe that institutional improvements in COCOM as a multilateral control organization will benefit all COCOM members. Of course, the British Government has a responsibility for assuming its fair share of the burden for improving COCOM.

America's British trading allies are eager to preserve the principle of stable commercial relations, and the concept of free trade. During the past few years, we have witnessed a troublesome tendency on the part of successive American Administrations to use the EAA to impose unilateral trade sanctions as a means to accomplish foreign policy objectives—often with costly political and commercial consequences to United States and European economic interests.

IMPROVING BILATERAL CONSULTATION MECHANISMS

All too often, the broad authority granted by Congress under the EAA to control exports to further the foreign policy interests of the United States has been invoked by the United States Government without prior consultation with its NATO allies or America's other trading partners. I believe that America's failure to consult with her trading partners before imposing trade sanctions has detracted from the effectiveness of those sanctions by diminishing the chances for multilateral support. The Soviet gas pipeline embargo is a good example: U.S. allies who were not consulted actively opposed the sanctions which were ultimately substantially repealed.

The LCCI supports proposed amendments to the EAA to strengthen the consultation requirements and mechanisms under the EAA with the objective of ensuring that American export controls are not hastily imposed without adequate discussion with affected parties outside the United States.

PRESERVING CONTRACT AND LICENSE SANCTITY

Successive American Administrations have used the foreign policy and national security provisions of the EAA to prohibit the delivery or export of technology or data under contracts entered into prior to the imposition of export controls.

The LCCI opposes interference with existing commercial contracts and licenses and strongly supports legislative initiatives in both the House and Senate versions of the EAA to preserve contract sanctity. The LCCI considers the Reagan Administration's proposed contract sanctity amendment to be inadequate. The Administration proposal—which is not in either the House or Senate bill—limits interference with existing contracts only where delivery is required within 270 days.

The concept of preserving the sanctity of commercial contracts is very important. The reputation of U.S. companies as exporters is at stake, and it is essential to U.K. importers of American technology that the U.S. be a reliable trading partner, especially when long-term commitments are involved. Unfortunately, when the sanctity of contracts has been violated due to the imposition of foreign policy controls, serious bilateral trade problems have arisen between United States and United Kingdom.

For example, just a few months ago, the British Export Guarantee Department (EGCD) announced that it will no longer extend coverage for commercial losses caused by actions taken by the U.S. Government. Undoubtedly, the EGCD's decision will serve to deter British enterprises from purchasing United States technology and data—especially those British companies that trade with the Soviet Bloc.

We also believe that the EAA should also be amended to protect the sanctity of licenses granted in connection with export contracts.

EXTRATERRITORIAL APPLICATION OF THE EAA

The LCCI supports legislative initiatives to limit strictly the extraterritorial application of the EAA, i.e., its application to United States foreign subsidiaries, their affiliates or licensees.

For those of us who have been troubled by this disruptive trans-oceanic exercise of United States jurisdiction under the EAA, one cannot help but conclude that such interference in our sovereignty has evolved primarily because America believes it does not receive the support and cooperation of COCOM members in the imposition of foreign policy controls. Yet the unilateral attempt by America to reach beyond her borders into the sovereign territory of her trading partners is shortsighted: it generates less not more cooperation with America's policy objectives.

The extraterritorial application of the EAA has not only been ineffective, but also very damaging to the unity of the Western Alliance.

The LCCI furthermore believes that this exercise of extraterritorial jurisdiction raises serious international legal issues as well which requires further study by the Congress.

We, therefore, recommend that Congress draft appropriate amendments which would prohibit the U.S. Government from applying foreign policy export controls on companies incorporated abroad except in limited circumstances.

LICENSING OF MULTIPLE EXPORTS

The LCCI supports Congressional amendments to create new classes of export licenses which would facilitate multiple exports of technology and data, including the so-called "Comprehensive Operations License."

Continuing multiple shipments of the same type of licensed items to the subsidiaries and affiliates of U.S. exporters should not require additional export licenses each time the same product is sent to the same ultimate consignee. We find, as importers of American products, that the bureaucratic constraints of repetitive licensing applications interfere with the free flow of commerce, with no apparent justification.

FOREIGN AVAILABILITY

Both U.S. exporters and British importers support amendments to strengthen the foreign availability provisions of current law. If items are freely available from foreign sources not cooperating with U.S. export controls, export controls do not serve any policy interest of the United States. In fact, the imposition of export controls on items available in foreign markets serves only to harm U.S. commercial interests.

We believe that negotiations within COCOM to produce a workable system for determining the foreign availability of controlled items is essential for ensuring that unnecessary controls are eliminated. Of course, the LCCI appreciates the need to improve administrative procedures for making foreign availability determinations, and therefore we support Congressional efforts to increase the Department of Commerce's capabilities in this area.

IMPORT CONTROLS

A proposed Senate amendment to the EAA would subject violators of national security controls maintained cooperatively with other countries (e.g., COCOM controls) to import controls on technology or data coming into the U.S. The LCCI believes that such restrictions, if any, should properly be administered through COCOM and not by unilateral application of U.S. law.

In closing, Mr. Chairman, the LCCI appreciates the enormous task still ahead for the United States Congress. You are attempting to produce a bill that reconciles two arguably inconsistent goals: ensuring the security of the United States and the NATO alliance, while promoting U.S. exports and international trade.

I know I speak for thousands of British companies in urging that, as you debate these difficult issues, you not lose sight of the impact which your debate and actions will have on America's trading partners. The LCCI hopes that these comments will be helpful and looks forward to cooperating with the U.S. business community and the Congress in designing and implementing an effective revision of the EAA.

Thank you for the opportunity to participate in your important debate.

ALLIS-CHALMERS,
Milwaukee, Wisc., June 20, 1983.

Hon. CHARLES PERCY,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, D.C.

DEAR SENATOR PERCY: I regret that my previous commitments do not permit me to testify on the Export Administration Act before the Senate Foreign Relations Committee. My comments, however, would echo the principles on export administration that were adopted by The President's Export Council and subsequently transmitted to the President on May 31.

I have enclosed a copy of the PEC Principles of Export Administration for use by your Committee. I hope they will be of some assistance to you and your Committee in your work on this very critical piece of trade legislation.

Sincerely,

DAVID C. SCOTT.

Enclosure.

THE PRESIDENT'S EXPORT COUNCIL,
Washington, D.C., May 31, 1983.

THE PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: The renewal of the Export Administration Act is one of the most important and difficult items on the current legislative agenda.

After examining the issue in great detail, the President's Export Council respectfully submits for your consideration the following set of principles that embody the Council's views and recommendations on export administration issues:

1. *Foreign availability.*—When the United States imposes export or reexport controls on goods or technologies that are also available from uncontrolled foreign sources, there are serious short and long term effects on the domestic economy. In the short term, U.S. exporters lose revenue; in the long term, however, this decline in market share negatively impacts production economies and employment. Therefore, export/reexport controls should not be imposed when the administering agency has been given evidence that foreign availability exists.

2. *International consultation.*—The most effective system of export controls—whether for national security or foreign policy purposes—results from multilateral cooperation among the concerned and affected nations. Therefore, whenever possible, the President should be encouraged to consult with United States allies and other concerned countries prior to imposing export controls.

3. *Militarily critical technology.*—The 1976 Bucy Report recommended that controls be placed on critical technology and keystone equipment rather than on a myriad of products. Such selective controls lend themselves to more effective enforcement efforts and also reduce the regulatory and paperwork burdens of both business and government. In accordance with the recommendations in the Bucy Report, the establishment of export controls over such technology and equipment should be accompanied by appropriate reductions in the controls over the non-militarily critical products of these technologies and this equipment.

4. *Multilateral national security controls.*—Stringent licensing requirements on exports to allied countries that cooperate with the United States in a multilateral system of export controls to protect mutual security interests create excessive paperwork, greater administrative costs and shipment delays. Where possible, consistent with the national security of the United States, every effort should be made to reduce the licensing requirements for exports to these cooperating countries.

5. *Enforcement.*—Effective enforcement is essential to restricting the unauthorized transfer of national security-sensitive technologies and goods. Enforcement efforts should take cognizance of and work in concert with the security measures taken by American industry to protect proprietary technology. Preventing the illegal transfer of goods and technologies also requires that enforcement efforts focus on the truly critical commodities. Excessive controls on outdated goods and technologies only dilute the resources and effectiveness of U.S. enforcement activities. Finally, to encourage the cooperation of American business, the Government should establish a voluntary disclosure program by providing reduced penalties for voluntary disclosures of unintentional violations.

6. *Extraterritoriality.*—Barring a national emergency, export controls that are imposed to further the foreign policy of the United States should be limited to those goods and technologies exported from the United States, its territories or possessions. When the United States imposes foreign policy controls on an extraterritorial basis, foreign customers become increasingly reluctant to source goods or components from the United States since their own products then can be made subject to U.S. foreign policy controls. As foreign customers diversify their sourcing away from the United States, U.S. exporters suffer the economic damages that accompany such declines in market share. Companies located in other countries but affiliated with U.S. firms as customers or through equity ownership, licensing or distributor agreements, etc. should not be required to participate in U.S. foreign policy controls if they run counter to the foreign policy of the host country.

7. *Disruption of existing contracts.*—When export controls are imposed for foreign policy purposes, the industries subject to such controls must shoulder a substantial portion of the resulting economic burden. Foreign customers, for example, become reluctant to renew or extend contracts for fear of disruption in the delivery of both the original equipment and spare parts or service because of government intervention. The long term economic impacts are particularly severe since these industries cannot fulfill existing contracts or plan on future contracts. These problems can also spread to other U.S. exporters since, by virtue of their nationality, they could be labelled as unreliable suppliers by both potential customers and foreign competitors. Such disruptions in commercial relationships result in excess inventories, idle production capacity, declining productivity, and ultimately, a reduced workforce. To maintain and improve the United States' trade balance, to enhance the image of U.S. exporters as reliable suppliers, and to contribute to the economic well-being of the United States, such export controls should not be applied to existing contracts unless a national emergency exists.

8. *Economic impact analysis.*—As previously discussed, export controls can seriously impact the domestic economy of the United States. With unilateral foreign policy controls, this impact moves beyond the initial loss of sales to attendant effects like increased prices resulting from reduced economies of scale, higher unemployment with its related social costs, and disincentives to continue or to initiate an export effort. The American business community is concerned that foreign policy controls are imposed without adequate business community input on final decisions which have short and long term economic impacts. To mitigate these concerns and to ensure that economic costs are adequately reviewed, affected or potentially affected industries should be consulted with greater regularity and thoroughness, as should the relevant government agencies. The results of these consultations and analyses should be set against the impact on the target country—a cost/benefit analysis—and made available to the public within a specific time frame, preferably before the controls are imposed.

Sincerely,

J. PAUL LYET, *Chairman.*

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